THE NEW-YORK

CITY-HALL RECORDER.

VOL. VI. *January*, 1822. NO. 12.

AT a COURT of GENERAL SESSIONS of the Peace, holden in and for the City and County of New-York, at the City Hall of said City, on *Monday*, the 7th. day of *January*, in the year of our Lord one thousand eight hundred and twenty-two.

PRESENT.

The Honorable

RICHARD RIKER, *Recorder*.

ASA MANN and ISAAC EMMONS } *Aldermen*.

HUGH MAXWELL *District Attorney*.

RICHARD HATFIELD, *Clerk*.

FORGERY—INDICTMENT—INTENT to DEFRAUD.

JACOB S. REDDINGTON'S Case.

MAXWELL and PRICE. *Counsel for the prosecution*.

HOFFMAN, BUNNER and NEVIN, *Counsel for the prisoner*.

An indictment, in the first count, charged the prisoner, substantially, with having forged and altered a bill of exchange, bearing date at Montreal (Lower Canada,) with intent to defraud the President; Directors, and Company of the Montreal bank, S G., R G., and other persons to the jurors unknown.—In another count, he was charged with having passed the same bill, with intent to defraud the same bank, by its appropriate name, as above. S.G., R.G., N P., S. W., and J S.; and other persons to the jurors unknown; and, in another count, he was charged with having passed the same bill, with intent to defraud P. W. and S., (a firm) *and* N P, S.W., and J S., and the forgery, alteration, and passing were alleged, in the indictment, to have taken place in the city of New-York.—It was held, 1., that if the jury believed the bill to have been altered in Canada, they ought to acquit the prisoner of the *forgery* and *alteration*—2., if they believed he passed the bill in New-York, they ought to convict him for *passing it* And 3., that there was *sufficient certainty* in the indictment, relative to those whom he intended to defraud.

The prisoner was indicted, for the forgery and passing of a certain bill of exchange, set forth in the indictment in the following words and figures:

"1500*l*. stg. No. 1042 Montreal 14. June 1821.

Sixty days after sight of this first bill of exchange (second and third unpaid) Pay to the order of Robert Griffin, Cashier, Fifteen *hundred pounds* sterling value received, which place, with or without further advice, to account of the Montreal Bank.

S. GERRARD Prest.

To Messrs. Thomas Wilson and Co. London."

In the first count of the indictment, the prisoner, was charged with having falsely and feloniously made, forged, altered and counterfeited, and with having willingly assisted in the making, forging, altering and counterfeiting the same bill, on the 28th of July, 1821, at the first ward of the city of New-York, with an intention of defrauding the President Directors and Company of the Montreal Bank, Samuel Gerrard, Robert Griffin, and other persons to the jurors unknown. In the second count, the prisoner was charged with having feloniously uttered and published, as true, knowing it to have been falsely made forged and counterfeited, (at the same time and place) the same bill of exchange with an intention of defrauding the President, Directors and Company of the Montreal Bank, Samuel Gerrard, Robert Griffin, Nathaniel Prime, Samuel Ward, junior, and Joseph Sands and other persons to the jurors unknown.—The third count stated that the prisoner uttered and published the same bill, intending to defraud Nathaniel Prime, Samuel Ward junior and Joseph Sands and other persons to the jurors unknown. The fourth count specially charged the prisoner with having falsely altered a certain genuine bill of exchange, drawn for fifteen pounds sterling, as above set forth, by erasing the word *pounds* after the word *fifteen* and substituting, imme-

diately after this word, the words *hundred pounds*; and the last count charged him with having uttered and published the same bill, with an intention of defrauding Prime, Ward and Sands, *and* Nathaniel Prime, Samuel Ward junior and Joseph Sands, against the form of the statute and the peace &c.

The prisoner pleaded not guilty to this indictment, and the case was brought to trial on the 11th. of January instant.

Maxwell opened the case to the jury and then introduced George W. Burrough, as a witness on behalf of the prosecution, who on being sworn, testified, that on the 28th. of July last, he was a clerk in the employ of Messrs. Prime, Ward and Sands, exchange brokers in this city; and that the prisoner, who then passed by the name of Jacob Smith, sold a set of bills of exchange to that house for about $7,200, and received payment in two several checks, drawn by the firm, on the Mechanic's bank, one of which (and the first one drawn) was for $500, and the one for the balance, in about two hours afterwards. The reason why the whole was not paid, at the same time, was, that the terms of the premium were not, at the first, definitively arranged; but the prisoner was present when the respective checks were signed by Samuel Ward, junior, one of the firm.

That gentleman, on being sworn, confirmed the testimony of Mr. Burrough and further stated, that the first time he, the witness, saw the prisoner, was on the 28th. of July, between eleven and twelve o'clock, in the forenoon; though, from conversation in the office, he had understood that the prisoner had, the day before, brought the bills to the office for sale. The premium he received, above the amount of the bill, was eight and a half per cent: and the first check he received was for $500, and the other for $6,731, 88—in the whole $7,231, 88.

The set of bills, of which one is set forth in the indictment, was produced; and both of these witnesses, in the course of their testimony, stated that they were the same which the prisoner sold; and they were both positive that the prisoner was the same man who sold them.

Robert Griffin, on being sworn, testified, that he is the Cashier of the Montreal Bank; that on the 14th. of June last, some person, unknown to him, purchased a set of bills of exchange for 15*l*. sterling on London, at the bank; that the set of bills, now here produced, is the same set, but altered to 1500*l*. sterling, by erasing the word pounds, in the body of the bill, after the word fifteen, and substituting the words *hundred pounds* immediately after the word fifteen; and by a corresponding addition, of cyphers after the figures 15, at the head of the bill. The bills were filled up by the witness as Cashier, originally; but the words, "*hundred pounds*" are not in his hand writing. The only difference, however, he could perceive between his own hand writing and the alteration is, in the letter *p* in the word *pounds*: as he uniformly writes that letter, in that word, a small p, enlarged; but, in the alteration, it is a small p.*

The witness produced a check margin book, of the Montreal bank; and, on holding the edges of the respective bills to the places in the book, from which they were cut, a precise correspondence ensued. And the witness further stated, that from the 14th. of May until the 2d. of August last, he filled up no bills of exchange for 1500*l*. nor were any such issued from the bank.

The counsel for the prosecution offered to read in evidence the examination of the prisoner, taken in the police, before Mr. Justice Hedden, on the 19th. of November last.

This examination was taken by question and answer. No admission of consequence, was made by the prisoner; and it appeared that he uniformly refused to answer the several inquiries put to him, touching his possession of the bills; generally adding, after each re-

* In that part of the bills where the word *pounds* was erased or extracted, not the least appearance of an obliteration or erasure could be percieved, on holding them before a light. No doubt the ink was extracted by some curious chemical process.

fusal "by the advice of my counsel." In the course of the examination, however, he was asked whether he had possession of the bill in question. The answer which follows is, "I wont answer that question." And, at the end of the examination, is this question: "Are you willing to sign this examination? It is then added, by the justice, that Mr. Hoffman here came in and the prisoner refused to sign the examination; and it was then signed by the justice.

The counsel for the prisoner wished that Justice Hedden might be sworn as a witness before the examination was read; and they alleged that it was not taken regularly, because it was not wholly read, in the order in which it stands, before it was signed by the Justice, and that he refused to make material explanations in it, at the solicitation of the prisoner.

Josiah Hedden, on being sworn, testified, that the examination was taken in the presence of Messrs. Bunner and Nevin, the counsel for the prisoner: that it was all read over to him except that part containing the last question and that which follows: that at this juncture, Mr. Hoffman came in and protested against the examination, when Mr. Niven requested that the whole should be again read, which the witness refused to do, and then put down the last question and read it to the prisoner with that part which follows: that on reading over the examination, Mr. Bunner requested (and the prisoner joined in the request,) that the answer to the question relating to the possession of the bills by the prisoner, should be altered to stand thus: "I do not wish to answer that question, by the advice of my counsel." But as the prisoner had before answered that question differently, as appears in the examination, the witness refused to make the alteration.

The Counsel for the prisoner objected to the examination as evidence, but the objection was overruled.

Richard Hart, on being sworn on behalf of the prosecution, testified, that he is High Constable of Montreal; that he has known the prisoner four years: that he kept a boarding house there, and that his name is Jacob S. Reddington, and not Jacob Smith.

The prosecution rested.

Hoffman raised the following question of law for the determinations of the court, and argued from the law and the facts, that the prisoner ought not to be put upon his defence.

1. The prisoner is charged, in the first count of the indictment, with having forged altered and counterfeited, in this city, a bill of exchange, *bearing date in Montreal;* and it is to be intended from that fact, without proof to the contrary, that the alteration was effected in that place. But there is no such proof; and the jury are warranted, in drawing the inference, that the offence was committed there; and therefore, the prisoner must be acquitted on that count, and the other counts in the indictment, charging him with the forgery and alteration.

2. He is charged in the second, third and fifth counts in the indictment, with having uttered and published *the same bill of exchange* set forth in the first count. There can be no question, on these counts, as to the fact: it is true, that he passed this bill to Messrs. Prime, Ward and Sands, in this city. But the instrument is not a subject of forgery within the statute: it is a foreign bill of exchange, to forge or alter, or pass which, is but a misdemeanor at common law.

3. The intent to defraud is of the very essence of the offence. It should be laid correctly, and proved as laid. But in this indictment, in several counts, the names of persons are laid whom, it is alleged the prisoner intended to defraud, in conjunction with a corporation, and a firm and persons to the jurors unknown; and, in the last count, it is stated that the prisoner intended to defraud Prime, Ward and Sands, *and* Nathaniel Prime, Samuel Ward junior, and Joseph Sands, persons whom it is impossible for the court and jury to know. There is, therefore, an incongruity, and a want of certainty in the indictment, in this particular, which is fatal.

The counsel agued upon each of these points at considerable length, and produced several authorities.

Price and Maxwell answered,

1. That it was true, that if the jury should believe that the Bill of exchange was altered in Montreal, the prisoner must be acquitted on the counts in the indictment for forgery; but, the first knowledge we have of the instrument is in this city, where, under a feigned name, he offered it for sale. It is, therefore, to be presumed that he effected the alteration here, until he shows to the contrary.

2. The words of our act (1 Vol. R. L. p. 405) in effect, are, that if any person shall forge or alter *any* bill of exchange &c. or shall utter and publish, as true, any bill of exchange &c. he shall be guilty of felony &c.—These words embrace all bills of exchange, as well foreign as inland.

3. The allegation in the indictment, relative to the intent to defraud is laid with certainty to a common intent, and that is sufficient. The names of all the persons who, it was supposed, were the most liable to be defrauded, are inserted.

After the reply of Bunner, the Recorder delivered the opinion of the court, that the case ought to go to the jury.

Niven opened the case to the jury; placing the defence, principally, on the ground that the bill of exchange came honestly into the prisoner's possession in Canada.

John Craig, on being sworn, as a witness for the prisoner, testified, that he resides at Stanbridge, in the province of Lower Canada, about fifty miles eastward from Montreal. In the month of July last, he saw the set of bills, now here produced, in the possession of Morrell Mc Goon, who, after some conversation, asked him whether he wanted to go to New-York, saying, that he had a bill of exchange, on London, for 1500*l*, sterling, and wanted some trusty person to go there and get it changed. After asking the witness how much he would ask to go, Mc Goon offered him $400, but the offer was declined. Afterwards, the witness heard that Mc Goon offered the same bills to other persons; and the next time he saw them was at the prisoner's house in Montreal, where the witness, (then on his way to Quebec,) staid two days. While there, a man named Curry, called on the prisoner and asked him whether he did not want to go to New-York. He answered that he did not know that he wanted to go, when Curry said he had a bill of exchange for 1500*l*, sterling, which he wanted to send here. The prisoner asked him why he did not sell it at Montreal, and the reply of Curry, was, that it was worth more in New-York. Curry then offered the prisoner $100, to go; and after some further conversation, he agreed to the proposal. The bills were shown, at the time, and, though, from the length of time, which has passed since the witness saw them, he is not positive they are the same he saw in the hands of Mc Goon and Curry, yet, he believes them to be so. The witness further stated that he was a farmer at Stanbridge, and he supposed himself worth $7000.

During a critical cross examination, conducted by Price, this witness further stated that he is a single man, and lives with his father who *now* owns the property; but, on his decease, the witness expects it will fall to him: that when the bill was delivered by Curry to the prisoner, four or five persons were present, among whom was James Love and one Burnham; the former of whom came with the witness from Canada as a witness on this trial. That Mc Goon is a man trading about the country; his character does not stand fair; and the witness is acquainted with J. Wing, Harvey and Mc Coy. The witness bore his own expences on the way.—When Curry delivered the set of bills to the prisoner, he mentioned that he owed money in Albany and it would not do for him to pass by his real name: and to obviate that difficulty, it was considered best that he should pass by the name of *Jacob Smith*.

The defence having rested, the counsel for the prosecution again called Richard Hart, who testified, that the character of Craig was very bad, even worse than that of the prisoner: that the first knowledge the witness had of him was that he was charged with having in his possession a large amount of counterfeit money; and he was afterwards arrested on a charge of conspiring to libe-

rate prisoners from Montreal gaol; and he was caught in the act of conveying fire arms and ammunition into the gaol.

Being cross examined, this witness among other things, further stated that the prisoner was arrested and confined in Montreal on a charge of the forgery of this bill of exchange: that an application was made from the Executive of this State, to the Governor of Canada, for his delivery and removal to this city; which application was granted; and after the order for his removal came into the hands of the sheriff, rumours were propagated that it was the intention of his counsel, and adherents to sue out a *Habeas corpus* for his detention and, should this fail, to rescue him on his way to the lines. To prevent this, the witness conveyed the prisoner beyond the lines by night.

This witness also testified that he was well acquainted with the prisoner's hand writing; and that the body and signature of a certain letter, bearing date at Montreal on the 18th of October last, directed to Morrell Mc Goon, and purporting to have been signed by the prisoner, are in his hand writing.

Hatfield, clerk of this court, Abel, one of the police magistrates, Kip, a deputy sheriff, and several others, on being sworn concurred in stating, that they were well acquainted with Richard Hart, the witness, that he formerly resided in this city, and that his character was good.

Price hereupon read the letter proved by Hart to be in the prisoner's hand writing.

The length of this curious document precludes the possibility of its entire insertion. The material parts follow.

After stating the miserable situation in which he is placed in Montreal goal, and that he was to be carried to New-York for trial, the writer addresses his friend thus: "Now Morrell if you do not assist in getting some witnesses, and help to defray the expense to N. York, I shall certainly think of you worse than a murderer—now is the time to assist a friend. If I get clear I shall have property enough to pay all witnesses and defray all expense. You must hire them at some rate or other to go: one of two things must be proved, and they are these: the first is to prove that I was not at New-York at that time, that is to say, I was not there on the 28th. of July, nor within a week of that time, either before or after; that I was in Dunham or some other place doing business with them, of course could not have been at New-York; this is one point, and the other point is this: prove that I came honestly by the bill, and did not know it to be altered; my plan is this, to have them say that they knew I came by it in Burkshire, and give my note for the amount, $6,666 80cts. being the exact amount of the bill, and that I was to have the premium if there was any, for my trouble and expence, that is, all that the bill was above par, and that I was to pay him as quick as I returned from N.Y.

* * * * * * * * * * *

Now, Sir, one of the two must be proved, the witnesses must be trained to both, so that when I come to New-York, they can swear to either, just as my counsel will think most proper. I do not think there would be the least danger of your going yourself. Alter your name, shave off your big whiskers, and you can make business to pay the expence and it will save cost. You know what the witnesses must say as well as I do, of course there is no need of writing. Now, I will mention some names that I think can be hired to go, and first I think that I. Wing will go, and if Harvey gets clear, I know he will be one, and there is David Mc Coy, there is Swallow and Craig, and I am almost sure that Love will go, and if Shaver can be found he will go. I am sure you can look up some ones to go. I want three to go, so as to make it strong, and if possible, I mean the state shall subpœna them on the state's expence—but if not, you must get them there, and get them that knows something and has the appearance of men.

* * * * * * * * * * *

Now, Morrell, let me conjure you, once more, for the sake of my dear family, and the friendship we always had together, not to forget me, and let my enemies get me down and send me to state prison.—If you do not assist me, I am sure you must have a remorse

of conscience, and will not enjoy yourself in this world, do not let me have to alter my good opinion of the character I have always maintained you to be. Your old maxim was this, that you did not pretend to much honesty, but a great deal of honor; and, as far as I have dealt with you, I have found you live up to the doctrine. I have nothing more to write at present, only give my love to all your family: When you write to me, let me be where I will, in place of your name, make or draw a line with your pen, where your name ought to be, as quick as convenient. You must let me know the names of the witnesses, that I can send for them. I shall send letters to you through some other person. May God of his infinite mercy, guide and direct you through this world, and assist you in your undertakings, is the prayer of your friend and well wisher, in the greatest trouble for the future welfare of his dear wife and family, and for whom he prays God to take under his protection, and guide them through this vale of tears. May I have the pleasure of seeing you at New-York with witnesses to clear me at my trial and obtain my liberty—May God grant that may be the case and bless us both in this world, and in the world to come, is the prayer of your friend.

JACOB S. REDDINGTON."

After this letter was read, Hoffman addressed the court, stating, that after the proof of that letter, he was sensible that any professional exertion he could make, would be fruitless. Certainly, upon the facts, he could not ask for an acquittal; but he did hope, from the reasons he had urged, that the Recorder would charge the jury, that the prisoner ought to be acquitted on those counts in the indictment charging him with the forgery.

The Recorder, in his charge to the jury, stated the following questions for their determination.

1. Whether the bill in question had been altered.

2. Whether the prisoner, himself, or in concert with others, effected that alteration.

3. If the bill was altered, whether the alteration took place in Canada, or New-York.

4. Was the bill uttered and published, by the prisoner in this city?

With regard to the first inquiry, there could not exist a doubt. Griffin, the Cashier of the Montreal Bank, swears positively, that the bill is altered from a genuine one, of 15*l.* to one for 15,00*l.* sterling.

There can be as little doubt, on the second question. From the tenor of the letter to Mc Goon, it appears, that the prisoner co-operated in effecting the alteration: and if so he is a principal in the guilt.

In the third place, did this alteration take place in Canada or in this city. There can be no doubt, from all the facts in this case, that the prisoner, in connection with this Mc Goon and others, perpetrated this fraud in Canada; and should the jury arrive at that conclusion, it would be their duty to acquit him on the counts in the indictment for the forgery and alteration of this bill; in as much as the offence was committed without the jurisdiction of this court.

Lastly, did the prisoner utter and publish this bill, in this city, as true, knowing it to have been altered?

The Recorder here adverted to the testimony of Borough and Ward, to show that the prisoner passed the bill in this city; and to show that he passed it knowing it to have been altered, the Recorder recurred to the letter. And he concluded by charging the jury, that if they should believe that the alteration of the bill was effected in Canada, then they ought to acquit him on those counts in the indictment charging him with forgery; but if they believed that he passed it in this city, knowing it to have been altered, it would be their duty to convict him on the other counts in the indictment.

The prisoner was found guilty by the jury, on the counts in the indictment charging him with uttering and publishing the bill of exchange, and was acquitted on those counts charging him with the forgery and alteration; and on the last day in term, the Recorder, after an impressive address, sentenced the prisoner to the state prison for life.

SPIRIT OF CRIMINAL CASES,

FROM

THE REPORTS

OF

New-York, New-Jersey, Massachusetts, and Pennsylvania;

WITH THE POINTS IN THIS WORK, FROM ITS COMMENCEMENT; THE WHOLE BEING ARRANGED UNDER APPROPRIATE HEADS, ALPHABETICALLY, CONSTITUTING A GENERAL INDEX OF CRIMINAL LAW IN THIS COUNTRY.

Accomplice.

1. Testimony of an accomplice to be strictly scrutinized, i. 10
2. Formerly not a competent witness; but this rule now exploded, i. 59
3. If the testimony of an accomplice is corroborated by other evidence, it is entitled to credit, i. 65. 133
4. Indicted jointly with one against whom he hath been called to testify, is bound, on his cross-examination, to disclose fully his own turpitude, i. 159
5. The testimony of an accomplice, when corroborated by the facts and circumstances of the case, or bearing the stamp of truth, intrinsically, is entitled to credit, i. 162. ii. 21. 73
6. When uncorroborated, not to be believed, ii. 38, *et passim*
7. The testimony of an approver, if corroborated by the declarations of the prisoner, is entitled to belief, v. 94

See CONSPIRACY, 17.

Affidavit.

1. Will, after conviction, be received by the court, in mitigation of punishment, i. 105. 171
2. An affidavit of the want of material witnesses, made for the postponement of a trial during the same term an indictment is found, and within a few days after such finding, need not allege the particular matters which the defendant expects to prove by such witnesses, iii. 7
3. In deciding on the propriety of postponing a trial, the court will not regard matters not before it on affidavit, *ib.*
4. It seems that the *jurat* of an officer authorized to take affidavits, is conclusive evidence of the taking of an affidavit, iii. 11
5. In a prosecution for an assault and battery, the court will receive affidavits in mitigation of the punishment, from the defendant, after conviction, and affidavits in aggravation on behalf of the prosecution: but if no affidavits in mitigation are presented, or, if so, withdrawn by leave of the court before inspection, affidavits in aggravation will not be received, except for some special cause, iii. 73
6. When affidavits in mitigation are received by the court, the prosecutor has no right to demand their inspection, or reading, to enable him to prepare counter affidavits; but should the court be in want of information relative to any matter disclosed in the affidavits, on either side, the court will hand back the affidavits, confining the parties to particular points, *ib.*
7. Affidavits submitted to the court, after verdict, for the purpose of mitigating the punishment, should not controvert

the facts upon which the verdict is founded, iii. 128

8. After conviction, the court will not hear an affidavit of the prisoner's wife, denying any facts on which the verdict was founded, iv. 113

9. Prosecutions for perjury in affidavits, i. 155. iv. 130. 168

10. To postpone trial, containing facts, in addition to those contained in another previously read, on which such motion had been denied, will not be heard, v. 171

11. Or deposition made in a cause cannot be read fully, to impeach the oral statement of a witness in a particular fact, i. 33

See Assault and Battery, 45. Attachment and Contempt, 3. 15. 17. Distress, 4. Jury, 5.

Aiding and Assisting.

De Witt's case, (10 *Mass. Rep.* 154.)
Stevens' case, (10 *Mass. Rep.* 181.)
Hill's case, (11 *Mass. Rep.* 136.)

1. In *De Witt's* case, which was for larceny, it appeared that the goods were stolen in another county, and brought into *Cumberland* county, by two persons other than the prisoner, who afterwards came and joined them in the possession and disposal of them. The charge to the jury, on the trial, was, that if they believed him concerned in the theft, they might convict him. This they did; and a motion being made in arrest of judgment, in *May*, 1813, it was denied.

2. In the case of *Stevens*, who was convicted on an indictment for altering an order in writing for money, payable to himself, it appeared that he confessed that another did it, he, the prisoner, knowing and assenting to it. On a motion in arrest of judgment, in *June*, 1813, it was held, that from the evidence, the jury were justified in inferring that he procured it to be done; and the motion was denied.

3. So, in the case of *Hill*, who was indicted for passing a counterfeit bank note to *Joseph Bradbury*, it appeared that the prisoner delivered the note to a boy, named *Aaron Smith*, directing him to pass it, agreeing to give him one half if he should pass it; and if he could not, to return it. *Smith* passed it, as true, to *Bradbury*, for a waistcoat pattern, giving three dollars, and returning the change to the prisoner; *Smith* being innocent, and ignorant that the note was bad. After conviction, a question was raised for the opinion of the court, whether the evidence proved a passing of the bill to *Bradbury* by the prisoner; and, in *May*, 1814, the court, after consideration, adjudged that the evidence was sufficient, and the prisoner was sentenced.

4. Aiding, abetting, and assisting, in a felony, render all concerned principals, ii. 86. 143

5. Where J., in a crowd, near which were C. and R., picked a man's pocket of his pocket-book, and immediately made off and whistled, upon which C. and R. left the crowd and went with J. to a place remote from that where the pocket was picked, where the three were found dividing their supposed spoil, this was held by the jury sufficient evidence of a co-operation of the whole in the felony, iv. 178

6. He who drives and has management of a sleigh, and suffers young persons, whom he carries out on a party of pleasure, or for stealing, to stop the sleigh, and steal the property of others before his eyes, and takes no measure to restrain or prevent them, is as guilty as the thieves, vi. 2

7. Consenting to the commission of a felony, is aiding, abetting, and assisting, *ib.*

See Assault and Battery, 26. Conspiracy, 42. Larceny, 20.

Arrest.

L. S. Field's case. (13 *Mass. Rep.* 321.)

1. A sheriff may appoint one his aid without writing; and such aid, in the execution of civil process, is entitled to the protection of the law equally with the sheriff, although not in his sight, provided both are pursuing one business or object.

Motion for a new trial, in *September*, 1816. The defendant was indicted and convicted for assaulting and beating *Sa-*

muel Rich, when performing the duty of an assistant or aid of *Bates*, a deputy sheriff, in executing the duties of his office, in serving an execution on *W. A. Field* for $ 99.

The facts were, that *Rich*, having the execution, delivered it to *Bates* to be served, proposing to be appointed his aid in serving it. The proposition was accepted, and it was agreed between them, that *Rich* should go forward and converse with *W. A. Field*, then at his brother's house, the defendant's; and *Bates* expected that *Rich* would arrest the debtor, if he should attempt to escape. Being alarmed on their approach, he ran into the woods, followed by *Rich*, who overtook him. He gave *Rich* a violent blow on the head with a club, when *Rich* seized him, telling him he was his prisoner. The debtor made no demand by what authority he acted. A violent struggle ensued between them. The defendant came up, and, without demanding by what authority *Rich* acted, gave him several severe blows on his head. The debtor escaped. The question submitted to the court was, whether the arrest made by *Rich* was legal; and it was insisted, on behalf of the defendant, that to claim the protection of an officer, the assistant must be in the officer's presence, at least constructively. (3 *Cowp.* 63.) In this case *Rich* was wholly out of reach of *Bates;* and did not declare upon what authority he acted. *Sed non allocatur.* He had no opportunity to declare his authority. The case in which one arrested may demand of one not known generally as an officer, to produce his authority, is when the party arrested submits and not immediately resists. (9 *Co.* 66.) The jury here, as in the case in *Cowper*, have found that *Bates* and *Rich* were both intent upon the arrest and detention of the debtor; and there was no necessity that the latter should have acted in immediate presence of the former.—Motion denied.

2. One acquitted by the jury and discharged on an indictment, is not privileged from arrest in a civil action, when taken before his return home, i. 138
3. Every citizen is bound to submit to the arrest of a watchman; but in stepping beyond the bounds of his duty, or unwarrantably exercising his power, he acts at his peril, iv. 56
4. The privilege from arrest does not apply to a prisoner, on a criminal charge, who has been discharged from duress of imprisonment, iv. 75
5. It is not only the right, but the duty, of every citizen, without a warrant, to use all lawful means in arresting any one committing a breach of the peace, iv. 111
6. A peace officer is not bound to arrest and detain a man as a felon, merely upon the representation made by another that he is a thief; especially when the goods alleged to be stolen are not in his possession, v. 4
7. A magistrate has a right, on his own view, and without a warrant, to arrest one or more, while engaged in committing a breach of the peace, but not after the affray has entirely subsided, v. 95
8. Where a dangerous wound has been inflicted, and the wrongdoer secures his door against a peace officer, who comes to arrest him for inflicting such wound, it is his duty, before breaking open the door for that purpose, to demand admittance; for, if he does not, a breach and entry will render him a trespasser, but of the lowest grade, v. 141
9. Where such wound has been inflicted, any one, without warrant, has a right to arrest the offender, *ib.*

See WARRANT.

Arson.

Van Blarcum's case. (2 *Johns. Rep.* 105.)

1. To burn a gaol, being the dwelling-house of the gaoler, is arson; and the court will not inquire into his tenure or interest.

The defendant was convicted at the *Duchess Oyer and Terminer*, for arson, in burning the court-house and gaol, which was described in the indictment as the dwelling-house of *John Forbes*, the gaoler.

A motion in arrest of judgment was made, that this was not *Forbes'* dwelling-house; but the court, in *November*, 1806, decided, that it was sufficient that this was his dwelling-house *in fact;* and the court would not inquire into

his tenure or interest. (See *Cotteral et al. ante*, vol. 5, p. 71.)

Cotteral and *Crannal's* case. (18 *Johns. Rep.* 115.—5 *City Hall Rec.* 77.)

2. Setting fire to a gaol, by a prisoner, merely for the purpose of effecting his escape, is not *arson*, nor is it a *wilful burning of an inhabited dwelling-house* within the first section of the act, (1 *R. L.* 407,) though the gaol is to be deemed an inhabited dwelling-house within the act.

In *May*, 1820, the prisoners were brought before the Supreme Court on *habeas corpora*; and, from the returns to the writs of *certiorari*, it appeared that they were convicted at the *Rensselaer Oyer and Terminer*, for *arson*, in setting fire to the gaol of *Rensselaer*, being the dwelling-house of *Jacob De Forest*, inhabited by him and his family, &c.

The facts, in brief, were, that *Cotteral* being confined for horse-stealing, and *Crannal* for a misdemeanor, (with ten others,) the prisoners took coals from a stove, and put them into a crack between the planks lining the room, and blew the coals into a flame; it being their intention to burn a hole large enough to admit a lever, so as to force off the plank, and by that means escape. Their first attempt failed; and, a few nights afterwards, (having saved considerable water out of their allowance,) they again set fire, and, as it increased, they threw on water to prevent its blazing and spreading. They succeeded in burning a hole through two tiers of plank large enough for a man to pass through, and they had forced up an iron bar, and removed a brick; when, having expended all their water, the fire blazed to the top of the room, and was beyond their control. It was discovered from the outside by a watchman; an alarm was given, and the fire was extinguished by the citizens.

The case was argued, and the court decided, that though a gaol was an inhabited dwelling-house within the act, (2 *Johns. Rep.* 105,) yet it does not appear that it was the intention of the prisoners to burn the gaol. It was their object to escape; and it would be carrying the doctrine too far to say, that setting fire to a prison, by a prisoner, merely for the purpose of effecting his own escape, amounted to the crime of arson. The judgment must be arrested.

N. B. *Cotteral*, having been convicted of horse-stealing, was sentenced to the state-prison ten years; and *Crannal* was remanded.

Rose Butler's case. (16 *Johns. Rep.* 203. —4 *City Hall Rec.* 77.)

3. Setting fire to a dwelling-house, *inhabited* at the time, by which only a part of it is consumed, is *arson* within the first section of the act, (*R. L.* 407,) and punishable with *death*.

On *habeas corpus*. The prisoner was convicted, at the *New-York Oyer and Terminer*, of arson, under the first section of the act, (*R. L.* 407.)

Facts. (See *ante*, vol. 4, p. 77.) The house was not entirely consumed. She placed the fire and combustible materials on the stairs, two or three of which were consumed. The family, being asleep, were alarmed by the noise of the fire, and awoke, and extinguished it. The judge who tried her, entertaining some doubt whether her offence amounted to *arson* under the first section of the act, the record of conviction was removed into the Supreme Court; and in *May*, 1819, it was decided that the conviction was proper; and she was sentenced to suffer death.

The same point was decided in the case of *Van Schaack*, (16 *Mass. Rep.* 105,) under the same state of facts as in this case. The decision took place in *September*, 1819.

Van Schaack's case, (16 *Mass. Rep.* 105.)

4. If any part of a dwelling-house, however small, be wilfully and maliciously consumed by fire, the offence of arson is complete.

The facts in this case, as regards the principle decided, bear such a resemblance to those in the case of *Rose Butler*, (16 *Johns. Rep.* 203, and *ante*, vol. 4, p. 77,) that it is deemed unnecessary to state them. The decision took place in the Supreme Judical Court of *Massachusetts*, in *September*, 1819.

5. Of a building on the seashore described, ii. 1

6. For a man to set fire to his own house, which is inhabited by himself and other tenants, in a populous city, is a great misdemeanor, ii. 85

7. *Quere.*—Is not such offence a felony punishable with death, by statute? ii.85
8. The doctrine relating to this subject illustrated, *ib.* n.
9. To constitute the offence of arson under the statute, it is not necessary that the house should be entirely consumed, iv. 77
10. To set fire, designedly, to a house, *then* inhabited as a dwelling-house, so that it is completely ignited, is *the wilful burning of an inhabited dwelling-house*, within the meaning of the first section of the act, (1 *R. L.* 407,) *ib.*

Authorities collected, iv. 78, 79

11. To set fire to a gaol, for the purpose of an escape, is not arson, v. 71
12. Though a gaol is an inhabited dwelling-house, within the meaning of the first section of the "act declaring the punishment of certain crimes," (vol. 1, p. 407,) yet, for a prisoner, who may be confined in a gaol, to fire it, with *an intention to escape*, is not a *wilful* burning within the act, *ib.*
13. To constitute such *wilful burning*, the prisoner must set fire for the purpose of consuming the building, *ib.*
14. To attempt to fire a house is a misdemeanor at common law, v. 181

Assault and Battery.

Bill's case. (10 *Johns. Rep.* 95.)

1. A party in the same indictment cannot be a witness for his co-defendant until he has been first acquitted or convicted; and whether they plead jointly or separately, makes no difference.

The defendant, being indicted jointly with another, at the *Delaware* Sessions, pleaded separately; and they elected to be so tried. His trial came on first; and after the prosecutor's testimony had closed, the defendant offered, as a witness, the other person with whom he was indicted. The testimony was overruled, and the defendant was convicted.

The Supreme Court, in *January*, 1813, decided that it was well settled that a party in the same suit or indictment cannot be a witness for his co-defendant, until he has been first acquitted, or, at least, convicted. Whether they be tried jointly or separately does not vary the rule. (1 *Hale's P. C.* 306. *Peake's Ev.* 100. *Note.* 6 *Term Rep.* 623. 1 *Stra.* 633. 5 *Esp. N. P.* 155.)

Judges of Genesee Sessions' case. (13 *Johns. Rep.* 85.)

2. On an indictment for an assault and battery, the trial will not be stayed because a civil suit is pending for damages; though it seems judgment, after conviction, may be stayed until the decision of the civil suit.

Application for a *mandamus* to the Judges of Genesee Sessions, commanding them to proceed to try *Henry Markham*, who had been indicted before them for an assault and battery, was made to the Supreme Court in *January*, 1816; and it appeared that the trial having been brought on, the defendant's counsel objected to its proceeding, on the ground that a private suit had been brought against him, for the same assault and battery, which was undetermined in the Common Pleas. The court refused to allow the trial to proceed.

The Supreme Court decided that this was not a sufficient reason for postponing the trial; though it might be for suspending judgment, after conviction, to regulate the discretion of the court in imposing punishment. The court, however, refused to grant the *mandamus* at that time, believing the judges to have been misled, by what is said in *Gould's Esp.* (part 2. 184.) that it is *the practice* in *New-York*, in such cases, to stay the criminal suit until after the decision in the private suit. There is no other practice, in such cases, than to stay judgment, after conviction. (See 2 *Mass. Rep.* 372.)

Easland et al. case. (1 *Mass. Rep.* 15.)

3. The wife of one indicted and on trial jointly with others for an assault and battery, is not a competent witness for either of the defendants.

Easland and four others were indicted together for an assault and battery; and while on trial, their counsel, in September, 1804, moved that the wife of one of them might be examined in behalf of the others. *Sed non allocatur:* (*Per Strong, Sedgwick, Sewall* and *Thatcher*, Justices:) She cannot be examined. To have had the benefit of her testimony, they should have moved to be tried separately from her husband.

Elliot et al. case. (2 *Mass. Rep.* 372.)

4. Where an indictment and a civil suit are pending for an assault and battery, the court will not stay proceedings on the indictment, if the person injured is not to be used as a witness for the prosecution.

The indictment was for an assault and battery of a very aggravated nature on J. B.; and a civil action was pending for the same, when their counsel, in *March*, 1807, moved that this indictment be continued until the civil suit should be decided.

The Attorney General said, that the injured party was not to be used as a witness, and there was therefore no ground for the motion; and of this opinion was the whole court, and the motion was denied.—See Judges of *Genesee Sessions'* case. (13 *Johns. Rep.* 85.)

Eyre's case. (1 *Serj.* and *Rawle*, 347.)

5. If a man raise his hand against another, within striking distance, saying, "If it were not for your gray hairs, I would tear your heart out," it is not an assault; because the words explain the action, and repel the idea of an intent to strike.

6. A Justice of the Peace who has an imperfect view of persons at work on *Sunday*, cannot forcibly enter the premises of another for the purpose of getting a better view, in order to convict the offenders, under the *Pennsylvania* act, 22d of *April*, 1794.

A motion for a new trial was made in *April*, 1815, in this case, which was for an assault and battery on *Joseph Grice*. He was a Justice of the Peace, and the defendant a ship-builder, in whose yard some men were at work on the Sabbath. *Grice*, with two other Justices, went there and remonstrated with him; and being within striking distance, *Eyre* raised his hand and said, "If it were not for your gray hairs, I would tear your heart out."—The Justices departed; but, in a short time *Grice* returned, when an altercation again took place between him and the defendant, whose yard he attempted to enter against the owner's will.

Yeates, J. charged the jury, that *Grice* had no right to enter the yard forcibly; and therefore, the opposition was lawful; and as to the point, whether there was an *assault* in the first instance, as there was contradictory testimony, he left it to the jury, who convicted the defendant.

The opinion of the court turned chiefly on the second point above stated; but the court were unanimously of opinion that the attempt to enter was unlawful; and that the words spoken, at the time the defendant's hand was raised, explained that it was not his intent to strike, and, therefore, it was no assault. The motion was granted.

7. On the trial, evidence to impeach the general good character of the plaintiff in this action, is inadmissible, i. 33

8. On the master in his school, by the father of a pupil, i. 53, 54

9. The master has a right to correct a scholar with moderation, i. 55

10. To arrest a man on a bail piece, in a proceeding, when the original suit had been settled, and no responsibility attached to the bail, is an assault and battery, i. 60

11. Committed under colour of law, i. 87

12. In a prosecution for—evidence that the prosecutor is an habitual drunkard, is inadmissible, *ib.*

13. Not committed by one in defending himself, on being attacked by persons who attempt to dispossess him forcibly, i. 96, 97

14. Tenant hath a right to make use of so much force as may be necessary in repelling an entry made to dispossess him by force, *ib.*

15. Committed on an inspector of an election, by the mob, *ib.*

16. Committed by two foreigners, with an intent to rob, i. 130

17. On a watchman, under peculiar circumstances of aggravation: consequence of such assault to the defendant, i. 150

18. Committed on a constable by a coachman; and wresting out of such officer's hands pistols for fighting a duel, *ib.*

19. Committed on a constable, and rescuing a prisoner, i. 151

20. Committed in sport on a passenger in a British ship, by the captain and crew, by shaving and immersing such passenger in a tub of water, contrary to his will, i. 167

21. Not committed by one who, to keep a boy from going about in the church, during service, and making a disturb-

ance, taps him gently over his head with a cane, ii. No. 2. 1.

22. One in peaceable possession, hath a right to make use of so much force as may be necessary to enable him to retain such possession, or to remove an invader, ii. No. 2. 4.

23. Committed by a schoolmaster on a young female, ii. 147

24. The defendant cannot give in evidence his good character, on the traverse of an indictment for an assault and battery; as this offence does not necessarily involve moral turpitude, iv. 154

25. To pursue a man with a dangerous weapon, coming so near him, as that danger to his person may be reasonably apprehended, is an assault, v. 95

26. M. the owner of a horse and gig, in company with J. whom he had invited to ride with him, drove, with great speed, through Broadway, and knocked down a woman in the street; it was held, that if J. assented to such immoderate driving, he was responsible for the injury, v. 77.

27. One who in consequence of abusive language which he uses to another, in his own house, on being attacked by him, casts a glass tumbler in his face, and cuts out one of his eyes, cannot exonerate himself by alleging, that the injury was the result of accident, and in self-defence, v. 93

28. For an officer who has taken one on an execution against his body, at his own house, to permit him to go out of his sight into another room to shift his clothes, and get his bed to go to prison, is an act of humanity, and is not such an escape as will justify the debtor, while on his way there, in assaulting and beating such officer, v. 135

29. Not justified by one (who when taken on execution against his goods or body, told the officer *he had no goods*, but subsequently, assaulted and beat him while on the way to prison,) by a suggestion that there were goods, *ib.*

30. On an indictment, containing two counts each, alleging, that an assault and battery was committed by four persons, the Jury may find the whole guilty, though it may appear in proof that three of them only were engaged together at the same time, in committing such offence, and that one of them, at another time, committed the offence on the same person as the others did; and, in such case, the three must be found guilty on one count, and the fourth acquitted on that, but convicted on the other count, v. 136

31. In such case, the Court will not permit a verdict of acquittal to be rendered in favour of the fourth, that he may be admitted a witness for the others, *ib.*

32. Unless the damages rendered on an inquest, for an assault and battery, appear, at first blush, enormous, the court will not interfere, v. 85

33. And false imprisonment, committed by a turnkey of a prison on a counsellor, by detaining him there a long time, locked up, while visiting a client, iv. 56

34. Committed by one who had purchased a ticket for a public ball, on the master of the school, for refusing admittance, iii. 37

35. It seems, that in such case, by the purchase of such ticket, the holder acquires a right of action merely, against such master, for refusing admittance, *ib.*

36. The defendant in an action for an assault and battery, who pleads *son assault demesne*, holds the affirmative; and, therefore, his counsel have a right on the trial to open the case and introduce testimony; but, if it appear, from all the evidence, that he commenced the assault, the plaintiff's counsel have a right to open the case and conclude, v. 63

37. It is a general rule, that the party holding the affirmative on the record, has a right to open the case and conclude, but not where all the testimony negatives his affirmative allegation, *ib.*

WITH INTENT TO MURDER.

Pettit's case, (3 *Johns. Rep.* 511.)

38. In an indictment for an assault and battery, with intent to murder, it is unnecessary to allege that the act was done feloniously, and with malice aforethought.

Writ of error from *Rensselaer*: The indictment upon which the prisoner was convicted and sentenced to the state prison, stated, in the usual form, an as-

sault and battery; and that the act was done with intent to murder the prosecutor; but it did not allege that it was done *feloniously* and of *malice aforethought*. This omission was the ground of error; but the court, in *November*, 1808, decided that the indictment was sufficient; and that the *quo animo* was to be collected from the circumstances, and might have been inferred from his previous declarations.

Judgment affirmed.

Barlow's case, (4 *Mass. Rep.* 439.)

39. An asssault, with intent to murder, is not a felony, either at common law or by statute (*Massachusetts*) of 1804. c. 123.

The defendant having been convicted under that act, for assaulting and shooting at one *Moses Robinson*, with intent to murder him, in *May*, 1808, moved in arrest of judgment, because the offence was not charged to have been committed *feloniously*; for by the act the offender, on conviction, shall be deemed a *felonious assaulter*; and the statute has, therefore, made the offence felony. *Sed non allocatur; et per tot cur:* The indictment properly described the offence: it is not felony either at common law or by the act; for there the word *felonious* is applied to the disposition of the offender's mind, as aggravating a misdemeanor, and not as descriptive of the offence.

40. When in a quarrel, or affray, a man, who is a wrong doer from the commencement, makes use of a knife, or some other unlawful weapon in attacking his adversary, he is guilty of an assault and battery, with an intent to commit murder, if by the common law, or the statute, it would have been murder, had the death of his adversary ensued by reason of such attack, i. 117. iii. 73

41. Not inferred, necessarily, though an aggravated assault and battery be committed, and, had death ensued it would have been murder, where the weapon used was not dangerous, iii. 73

WITH INTENT TO RAVISH.

42. Committed where one entered a dwelling-house, in the night, and personating the husband, proceeded to acts towards the wife, indicating such intent, iii. 91

43. In such case, the jury cannot legally acquit him of the greater, and convict him of the less offence; there being counts in the indictment, for an assault with intent to ravish, and for a simple assault and battery, *ib.*

Cooper's case, (15 *Mass. Rep.* 187.)

44. Where one is indicted for a rape, and the jury cannot agree to convict him, they may find him guilty of an assault with an intent to commit a rape.

On the trial of the prisoner for a rape, in *June*, 1818, the jury staid out all night, and in the morning returned and stated to the court, that one of them was of opinion that if suitable resistance had been made, the crime could not have been committed; and that he was fully resolved never to join his fellows in a verdict of guilty: The court, after conferring together, instructed the jury, that they might find him guilty of an assault with an intent to commit a rape, if they were all convinced that such assault was made; for the less offence was included in the greater.

In a few minutes, the jury found such verdict.

MITIGATION.

45. Matter, not admissible in justification of an assault and battery, but which goes merely in mitigation of the punishment, will not be received by the court, on the traverse of an indictment for that offence. Such matter should be laid before the court by affidavit only, iii. 73

46. A previous conviction and fine, in the sessions, for an assault and battery, ought, on a trial for the same offence, in a civil tribunal, to go in diminution of damages on the score of *public example*, but not for the *private injury*, v. 63

47. It is not an assault to point a cane at one, in the street, in derision, and for the purpose of insulting him, but without an intention of striking him, vi. 9

See AFFIDAVIT, 5, 6, 7, 8. COMPOUNDING, 3. FEME COVERT, 8, 9. 11. FISHERY, 4. JURY, 37. POSSESSION, 6. WARRANT.

Attachment and Contempt.

Freer's case, (1 *Caines' Rep.* 485.)

1. Though the defendant, on a rule to show cause why an attachment should not issue against him for a contempt in a publication, denies in his affidavit, any disrespectful intent, yet, if the words published are, in the opinion of the court, contemptuous, the attachment will be issued.

A rule was granted against the defendant, printer of the *Ulster* Gazette, to show cause why an attachment should not issue against him, for publishing matter relative to *Croswell's* case, while pending. (*See* LIBEL, *post.*) In an affidavit, he denied any intentional disrespect; but the court, in *November*, 1803, considering the matter contemptuous, ordered that the rule be made absolute, and in the *February* term following, on his being brought into court, fined him $10. (1 *Caines' Rep.* 518.)

Van Wyck's case, (2 *Caines' Rep.* 333.)

2. A subpœna to testify in the Supreme Court, need not specify *where* the court is to be held.
3. Cause may be shown, *by affidavit*, without personal appearance, why an attachment ought not to issue.

A motion having been made for a rule against the defendant, to show cause why an attachment should not issue against him for not obeying a *subpœna*, he sent an affidavit from *New-York* to *Albany*, where the court sat, in *February*, 1805, stating, among other things, that a ticket annexed to the affidavit (which ticket omitted the name of the city where the court was to act) was served on him, but that no subpœna was shown him *at the time*. The court decided, that as the meeting of the *Supreme Court* was regulated by a public act, and as the defendant was a counsellor, the ticket was good: that cause, in such case, may be shown by affidavit, without a personal appearance; but that, as he does not state that a subpœna was not shown him *at any time*, and as the service might first have been made irregularly, and afterwards a new service made, and as the service was positively sworn to in the affidavit on which the rule was granted, the court, for further explanation, made the rule absolute.

Few, Van Wyck, and *Townsend's* case, *ex relat. Lewis.* (2 *Johns. Rep.* 290.)

4. Where, during the pendency of a suit for a libel, (the plaintiff having, after commencing the suit, published in a paper that the publication of the alleged libeller was a *base, villanous*, and *slanderous falsehood*,) certain persons, electors for governor, at a political meeting passed resolutions disapproving of the commencement of such suit, as intolerant and persecuting; on a motion for an attachment against them, on his behalf, they disavowed, on oath, any intentional disrespect, or contempt of the court, and declared that the only object of the resolutions was to influence the electors; the court refused to make the rule absolute.

The relator, then governor of this state, had commenced a suit, in the Supreme Court, for a libel, against one *Farmar*, who had been a chairman at a public meeting, in which resolutions were passed, disapproving the political conduct of the relator, then governor. After the commencement of the suit, he published in the *Morning Chronicle* that *Farmar's* statement was "a *base, villanous*, and *slanderous falsehood*," &c. Preceding the election for governor, and in *March*, 1807, the defendants, with others, electors, at a public meeting in *New-York*, passed and published certain resolutions, among which was one stating that they considered the prosecution commenced by Governor *Lewis* against *Farmar*, as chairman of a public meeting, to be an unwarrantable attempt to suppress and destroy their dearest rights, &c. and that such persecution evinced an intolerant spirit, &c.

On a rule to show cause, the defendants, under oath, disavowed any intentional disrespect or contempt of the court; and alleged that the only object of the resolutions was to influence the election. The court, in *May*, 1807, after argument, refused to make the rule absolute; and in their opinion stated that the first impropriety was on the part of the *relator*, in making the publication in the *Chronicle*.

Oswald's case, (1 *Dall. Rep.* 319.)

5. On the expiration of a rule to show cause why an attachment should not issue for a contempt, where the respondent is contumacious, and declares he will not answer interrogatories, should they be filed, the court,

without making the rule absolute, will proceed immediately to sentence him.

The proceedings in this case took place in the Supreme Court of *Pennsylvania*, in *July*, 1788, on the expiration of a rule to show cause why an attachment should not issue against *Oswald* for a contempt in publishing, in his newspaper, a libel against *Andrew Brown*, relative to a suit commenced by him against *Oswald*, then pending in the same court. The respondent, on his appearance, often declared that he had no intention to commit a contempt; but, on being asked by *M'Kean* Ch. J. whether he would answer interrogatories to be filed, declared he would not; and persisted in this, saying, "Let the attachment issue." Whereupon, the court said, that where a defendant appeared, there was no necessity to make the rule absolute; and the sentence of the court for the contempt, was immediately pronounced.

Duane's case, (4 *Yeates*, 347.)

6. An attachment may be issued against a member of Congress for a contempt in not attending under a *subpœna*, if he is not attending, going to, or returning from Congress.

A motion for an attachment for a contempt, alleged to have been committed by *Joseph Clay*, member of congress, for not attending court on *subpœna* in this case, on the part of the defendant, who was indicted for a *libel*, was made to the court in 1807; and his privilege was claimed, on the sixth section of the *United States* constitution: "The senators and representatives shall, in *all* cases, except *treason*, *felony*, and *breach of the peace*, be privileged from *arrest*, during their attendance at the *session* of their respective houses, and in *going to* or *returning from* the same."

Sed per cur. (*Yeates*, J.) The privilege allowed is freedom from *arrest*. The service of a *subpœna* is no arrest; it is a mere notice to the party. The service of an attachment for a contempt includes an arrest; but such contempt is neither treason, felony, nor breach of the peace: but the privilege is confined to the periods of the members' attendance at the *sessions* of their respective houses, going to or returning from the same. In this case, the attachment is withheld, until a proper case be shown justifying the measure. (See *United States* vs. *Cooper*, 4 *Dall. Rep.* 341.)

7. To publish any matter in a public newspaper, reflecting on the conduct of jurors or witnesses, in a case, or calling in question the propriety of a judicial proceeding, during the pendency of such case, and while it is undetermined, is a contempt of court, iii. 31

8. There is no question but that the court of general sessions in the city of New-York, can, legally, proceed by attachment against a party guilty of a contempt, not committed in the face of the court, *ib.*

9. Where the matter alleged as contemptuous, was in a newspaper published by the party, which was filed when the application was made, it was held unnecessary to show that a copy of the matter was served with the rule to show cause, *ib.*

10. In such case, on the day for showing cause, the District Attorney may proceed to read and point out the matter; and if the party doth not purge the contempt, the rule for an attachment will be entered, *ib.*

11. On the return of the attachment, the District Attorney files interrogatories with the clerk, who reads them to the party; and the answer or answers must be on oath, *ib.*

12. On the day for showing cause, if the party purges the contempt, the rule will be discharged, *ib.*

13. To assert, of and concerning the grand jury, as a body, while they are sitting, that they are incompetent to the discharge of their duty, or to make such assertion concerning any individual on the jury, is contemptuous; but such assertion relative to an individual member, is not such a contempt as will induce the court to proceed against the party by attachment, iii. 64

14. The answers of the party, under oath, to whom interrogatories are administered, in a matter of contempt, must be relied on as true, *ib.*

15. A copy of the affidavit upon which a motion for a rule to show cause is founded, together with a certified copy of such rule, should be served on the par-

ty required to show cause in a proceeding for an attachment, iv. 168

16. The court will not proceed by attachment against an individual for a contempt, in sending a private letter to another, who is the prosecutor in a case of libel pending against the writer of the letter, however scurrilous and abusive it may be, and though it may relate to the subject matter of the libel, unless it clearly appears that it was designed to interrupt the administration of justice, v. 8

17. On a proceeding for an attachment, the affidavit filed by the party aggrieved, to show cause, is to be taken as true; but if it be evasive, and does not directly meet the charge alleged, the court will require him to answer interrogatories, *ib.*

18. For a defendant in the case of a libel to whisper the interjection *pish* to the prosecutor, attending as a witness, in the presence of the court, but at the time without its notice, in answer to a stern look of the prosecutor, intended to insult the defendant, is not a contempt of court, *ib.*

19. The proceedings against a party for a contempt of court need not be entitled until the attachment issues; nor is it necessary that any person should be named as the complainant, v. 109

20. To publish even defamatory matters concerning a grand juror, not impeaching his conduct as such, is not a contempt of court, *ib.*

21. To support the proceedings against a party for an attachment to punish him for a constructive contempt in a publication, its language ought to be explicit, and the contempt palpable; for the court will not undertake to punish a party for this species of contempt, by construction; especially where, on showing cause, he denies, under oath, any intention to commit a contempt, *ib.*

See ATTORNEY, 1.

Attorney.

Smith's case, (3 *Caines' Rep.* 221.)

1. If an attorney withhold the money of his client, the court will afford relief in a summary way, without driving the client to an action.

Rule to show cause against the defendant, why an attachment should not issue against him for appropriating money collected for his client, having been granted, it was moved in *August*, 1805, that the rule be made absolute, on these authorities: *Say*, 51. 169. 4 *Burr.* 2060, 1. *ib.* 654. *Stra.* 621.

On his behalf, it was insisted that the proceeding was unwarranted; that the money was retained for costs, and other demands; and if such a measure was adopted, it would deprive him of a trial by jury.

The court decided that there was no doubt but that they had authority to proceed in a summary manner against attorneys for such misbehaviour. The case in *Say*, 169, is in point; and the court thereupon directed a special rule to be entered, that he exhibit to the clerk of the court, in *New-York*, within ten days, his counter demand for costs; and if any balance appeared due the client on a liquidation of accounts, that the defendant pay it in twenty days, or that the attachment issue.

Delaware Judges' case, (1 *Johns. Cases*, 181.)

2. A court of common pleas cannot legally remove an attorney from his office.

During the term of *October*, 1799, an application was made for a rule to show cause why a *mandamus* should not issue against the justices of the *Delaware* common pleas, commanding them to restore *Philip Gephard* to the office of an attorney of that court, from which he had been removed by them. They showed for cause, certain charges of malconduct against him, which they deemed sufficient for his removal; but the court decided, that the common pleas being a court of inferior jurisdiction, could not exercise that power; and the rule was made absolute.

3. Appearing for another without authority, iv. 21

4. Authorities relating to this subject collected, *ib.* n.

See EVIDENCE, 21. EXTORTION, 1.

Autrefois Acquit.

Barrett and *Ward's* case. (1 *Johns. Rep.* 66.)

1. The plea of *autrefois acquit* is no bar to a prosecution for the same offence, where the

indictment upon which the prisoner was first tried is so defective that no good judgment could have been rendered upon it.

The defendants having been indicted for a conspiracy, in *Washington* county, in *September*, 1803, and a juror having been withdrawn on their trial, by the District Attorney, for want of evidence, they were afterwards convicted on the same indictment; and, in *February*, 1805, the Supreme Court, for that cause, arrested the judgment. (See 2 *Caines' Rep.* 100. 304.) After their discharge they were again indicted for the same offence, at the *Oyer and Terminer*, in *June*, 1805. They pleaded *autrefois acquit*. Replication, *nul tiel record*.

Without stating the substance of the first indictment, suffice it to say, that the court, after hearing the arguments of the respective counsel, decided that the indictment was so defective that no good judgment could have been rendered on it; and for that reason they overruled the plea. *Vaux's* case (4 *Coke*, 44) was recurred to by Chief Justice *Kent*, in his opinion, as a leading case on the subject. Justices *Spencer*, *Thompson*, and Chief Justice *Kent*, were of this opinion; but Justices *Tompkins* and *Livingston* dissented.

Casboras' case. (13 *Johns. Rep.* 35.)

2. The *arresting* a judgment, after a conviction on an indictment for a felony, is not a bar to a second indictment for the same offence; although the second indictment is precisely similar to the first.

This case came before the Supreme Court in *August*, 1816, from the *Rensselaer* sessions, where the prisoner was convicted of felony in stealing promissory notes, and the court arrested the judgment and discharged him. Being again indicted for the same offence, on an indictment precisely like the other, he pleaded *autrefois acquit*. The public prosecutor demurred; the court below overruled the plea, and the prisoner was convicted, and sentenced seven years to the state prison.

The court, referring to *Barrett* and *Ward's* case, (1 *Johns. Rep.* 66,) decided, that after a court of competent jurisdiction has arrested a judgment, at the instance of the prisoner, it must be intended, legally, that the indictment was vicious; and, according to the principles of that case, (the first indictment being erroneous,) the plea of *autrefois acquit* was no bar, and was properly overruled.

3. A former acquittal, on an indictment for a rape, on the traverse of which it appeared, that the act charged in the indictment as a rape, was perpetrated, is a bar to a subsequent prosecution, founded on the same transaction, for an assault and battery, with an intent to commit a rape, but is no bar to a prosecution for an assault and battery. ii. 44

4. An acquittal by a jury, on a charge of having a single bank bill in possession, with an intention of passing the same, is no bar to a prosecution against the prisoner so acquitted, and another, for having a large quantity of other counterfeit money in possession, though on the first trial, for the purpose of establishing the *scienter*, proof of the same kind is produced as on the second, and both the prisoners, with the money described in both indictments, were arrested about the same time, ii. 73

5. A prisoner, having been indicted for stealing the goods of *Isaac Jenkins*, and it appearing on the trial, that the goods belonged to *Isaac Jenkinson*, was acquitted on that ground. Afterwards the prisoner was indicted for stealing the same goods, belonging to *Isaac Jenkinson*. To this indictment the plea of *autrefois acquit* was interposed, and the public prosecutor demurred. It was held that the demurrer was good. iv. 132

6. The offence of stealing the goods of A., is not the same felony as that of stealing the same goods, the property of B., *ib.*

See JURY, 28, 29. 32, 33.

Bail in Criminal Cases.

Trask's case. (15 *Mass. Rep.* 277.)

1. Where one is imprisoned for dangerously wounding another, so that his life is in danger, he is to be kept in prison, without bail, until it shall probably appear that the danger is over.

The grand jury gave information that the prisoner had been imprisoned for dangerously wounding one *Sampson*, who

was languishing; and it was uncertain whether he would not die of the wound. The prisoner was put to the bar; and, on motion of the Attorney General, was remanded to prison, to be detained there, until it should probably appear that the danger was over. See 2 *Hale's P. C.* 134.

2. It is not a matter of course for the court to bail a prisoner committed on a charge of felony above the degree of petit larceny, v. 11
3. On a charge of felony, the prisoner cannot be bailed, unless some matter, arising either from the testimony on which such charge is founded, or from affidavit, affording a presumption in favour of his innocence, be presented to the court or magistrate having power to bail, *ib.*
4. Where satisfactory cause was shown, why one committed for *manslaughter* was not tried the second term after the indictment was found, it was held, that he was not entitled to be bailed, *ib.*
5. What shall be a satisfactory cause, *ib.*
6. In exercising their discretion, whether one is entitled to be bailed, the court will regard a coroner's inquest against the prisoner for *murder*, though improperly on the files of the court, *ib.*
7. Arguments on this subject, and authorities, v. 12, 13, 14
8. The jurors, after the trial of a prisoner for manslaughter, occupying five days, in seventeen hours after they had retired to deliberate, returned a verdict of guilty, recommending him to mercy; but, on being polled, the third juror called, dissented. They were then again sent out; and, in twenty-two hours after they first retired, returned into court, and declared they could not agree, and were discharged. On an application to bail the prisoner, it was held, that it was doubtful whether he was guilty; that it stood indifferent whether he was so or not, and that, in the exercise of a sound discretion, he was entitled to be bailed, v. 49. 52
9. One indicted for a felony must sit in the prisoner's box during trial, unless on bail; in which case, he or she may sit by his or her counsel, v. 164
10. N. B. This rule, like most others resting on practice, has been subject to changes; and it is now the practice, that, whether on bail or not, the prisoner indicted for a felony must go into the box while the clerk is calling and swearing the jury; and when they are sworn, the prisoner may then come from the box, and sit by his or her counsel.

Bigamy.

Humphrey's case, (7 *Johns. Rep.* 314.)

1. In prosecutions for *Bigamy*, the mere confession of the party is not sufficient evidence of the first marriage; there *must be* proof of a marriage in fact.

On *habeas corpus*. The prisoner was convicted at the *Ulster Oyer* and *Terminer* for bigamy. It appeared that a woman, calling herself *Elizabeth Humphreys*, appeared before a magistrate, and charged the prisoner with this offence; and he acknowledged, voluntarily, that she was his wife, and that they had been married about four years before. Ample proof of the second marriage was given; and although it was objected by his counsel, that his mere confession of the first marriage was insufficient, the objection was overruled. In *November*, 1810, the Supreme Court, on the authority of *Morris* v. *Miller*, (4 *Burr. Rep.* 2056.) and *Birt* v. *Barlow*, (*Doug. Rep.* 171.) decided, that a marriage *in fact* should have been proved; and that a mere confession was insufficient. Prisoner discharged.

2. Defined, i. 138
3. Committed in marrying a niece, by one who had been in the service of the *United States*, and, on his return, found his wife married to another man, i. 137
4. Statute concerning bigamy extracted, *ib. n.*
5. Committed by one of the parents of two young men who, in early manhood, were ruined, i. 149
6. In a prosecution against a woman for bigamy, evidence of barbarous treatment by the first husband, before the marriage with the second took place, is inadmissible, but will be received by the court in mitigation of her punishment, i. 171
7. In a prosecution for bigamy, the former marriage, in fact, must be proved, ii. 111

8. The clergyman, to prove the *first marriage* of S., testified that he married one by *the name of S.*, but did not know the prisoner to be that S. :—held, that though this was sufficient evidence of the marriage *de facto*, of one named S., and collateral testimony might be given of the identity of S., yet, that the public prosecutor was precluded from establishing the second marriage, without first showing such identity, ii. 111
9. It seems that, in such case, even a representation, or confession, by S., the prisoner, to third persons, made subsequent to the time of the marriage by K. *that she was, the wife of J. S.* is not sufficient evidence of such a marriage, *ib.*
10. To prove the marriage the clergyman need not be produced, vi. 3
11. Confession of prisoner is admissable in corroboration, *ib.*
12. What age a marriage contract is valid, *ib.*
13. *Quere:* Whether one can be legally convicted of bigamy, who is indicted for marrying M., on the 1st of *September*, 1819, *at New-York*, and afterwards, on the 1st of *January*, 1821, at the same place, marrying D., while M. was living; when it appears in proof, that both the marriages took place in places remote from *New-York*, vi. 65
14. On the traverse of an indictment against P. for bigamy, in marrying B., and afterwards C. while B. was alive, contrary to the form of the act, it was held, 1. that it was incumbent, on the part of the prosecution, to prove *a marriage in fact* between P. and B.; and, 2. that if P. wished to exculpate himself from the charge of bigamy, because, at the time he married B., there was a disability on her part to marry, by reason of a valid subsisting marriage between her and another man, that it was incumbent on P. to show that there was *a marriage in fact* between them; and it cannot be inferred, by the jury, that there was a legal subsisting marriage between them, merely because it appeared, in the progress of the trial, from the testimony of one not present at the marriage, that they had been married eight or nine years before, and that she passed by his name when married to P., vi. 91

Bill of Exceptions.

Westchester Judges' case, (2 *Johns. Cases*, 118.)

1. If a court of Common Pleas, without sufficient grounds, refuse to seal a bill of exceptions, it is a contempt; and the Supreme Court will award a *mandamus*, to compel them to sign it.

On an affidavit, that a bill of exceptions had been tendered to the *Westchester* Common Pleas, which they had refused *to* seal, *Troup*, in *October*, 1800, moved the Supreme Court for a *mandamus* to compel them, or that they show cause; and, on a counter affidavit being read, stating that the bill of exceptions varied materially from the truth of the case, the court decided, that if a court of Common Pleas refuses without sufficient grounds to seal a bill of exceptions, it is a contempt for which the court will award compulsory process; (2 *Inst.* 42.) but, that as the bill of exceptions was untrue, that is a sufficient cause of refusal. Motion denied with costs.

Blasphemy.

Ruggles' case, (8 *Johns. Rep.* 290.)

1. Wickedly to say these words, "Jesus Christ was a bastard, and his mother must be a whore," was held a public offence, punishable by the common law of this state.

The defendant having been indicted in the *Washington* sessions for saying those words, removed the case into the *Oyer* and *Terminer*; and, in *June*, 1811, was convicted before Mr. Justice *Spencer*, and fined $500 and the costs. He removed the record and conviction into the Supreme Court, where, in *August*, 1811, the case was amply discussed. Chief Justice *Kent* pronounced the opinion of the court, in effect, as above. See his opinion at length. (*Bell's* case, *ante*. vi. p. 40. 4.)

2. To speak contemptuous and wicked words of God and our Saviour, impeaching the divine attributes, is an offence at common law denominated blasphemy; but where it appeared that such words, if spoken, were uttered in the course of an intemperate political dispute, by one who belonged to a church and frequented it, had a sense of religious obligation, and otherwise sus-

tained a fair character, it was held that he was not guilty, vi. 38.

3. It seems that in such case the prosecution is confined to the specific offence charged in the indictment, and cannot produce accumulative testimony, *ib.*

Breach of Sabbath.

Knox's case, (6 *Mass. Rep.* 76.)

1. The carrier of the mail who is under contract with the *Postmaster General* to carry the mail every day in the week, though he travel with it on *Sunday*, is not indictable under the *Massachusetts* act of 1791, c. 58, prohibiting travelling on the *Lord's day except from necessity or charity.*

This point was decided by the court in *November*, 1809, on an appeal from the Common Pleas; and the facts in brief were, that *Josiah Paine* had contracted with the *Postmaster General* to carry the mail between *Portland* and *Boston every day in the week*; and pursuant to the contract, the defendant, as the servant of *Paine*, drove the stage on *Sunday*.

Chief Justice *Parsons*, in his opinion, said, that by the federal constitution, Congress is authorized to establish post offices and post roads; and, by an act of Congress, (*May* 5, 1794) a road from *Portland* to *Boston* is established, and the *Postmaster General* is empowered to contract for the carriage of the mail on the road. Laws made in pursuance of that Constitution, are thereby declared to be supreme laws of the land. If a state law should prohibit the execution of powers authorized by a constitutional act of Congress, it is not binding. But the act of *Massachusetts* (1791, c. 58) does not prohibit travelling from *necessity*. A moral fitness and propriety of travelling, under the circumstances of any particular case, may be deemed *necessity* within the act. A *nolle prosequi* was entered.

Wolf's case, (3 *Serj.* and *Rawle*, 48.)

2 Persons professing the Jewish religion, and others, who keep *Saturday* as their sabbath, are liable to the penalty imposed by the *Pennsylvania* act, 22d April, 1794, for doing worldly business on *Sunday*.

This case came before the court in *January*, 1817, on *certiorari* directed to *Samuel Badger*, Esq. an Alderman of *Philadelphia*, requiring him to send up a conviction of the defendant, for a breach of the Sabbath. The defendant's counsel took several exceptions to the conviction; one of which was, that those who profess the *Jewish religion*, and others who keep the seventh day as their Sabbath, are not within the meaning of the act. And it was urged that there may be persons of that persuasion who may suppose that the fourth commandment, "Six days shalt thou labour," &c. imperiously binds them to work six days in a week, and believing *Saturday* to be the Sabbath, they can *only* cease to work on that day. *Sed per Yeates, J.* We have never heard this construction of that commandment by any persons who profess to believe either in the Old or New Testament. The Jewish Talmud, containing the traditions of that people, and the Rabbinical constitutions and explications of their law, assert no such doctrine. The true meaning of the command is uniformly supposed to be, that we should abstain from our labour *the seventh part of our time*, and devote the same to the worship of God, and the exercise of our religious duties. Conviction affirmed.

3. See also the case of *Stansbury* v. *Marks* (2 *Dall.* 213) which was tried on *Saturday* the 5th of *April*, 1793; and *Jonas Phillips*, a Jew, being offered as a witness by the defendant, refused to be sworn because it was his *Sabbath*. Whereupon the court of *Pennsylvania* fined him £10.

See Assault and Battery, 6.

Burglary.

Parker's case, (4 *Johns. Rep.* 424.)

1. The breaking open of a store in the night, at the distance of 20 feet from the dwelling-house, but not connected with it by any fence or enclosure, is not *burglary*.

The prisoner was convicted of *burglary* at the *Washington Oyer* and *Terminer*; and sentence was respited to obtain the opinion of the Supreme Court whether the case amounted to *burglary*.

The facts were these: The prisoner, in the night, broke open a store belonging to *Halsey Rogers*. The store was 20 feet from his dwelling-house, and no person slept in the store. The house and

store both stood on the same lot, and on the same line fronting on the highway; but there was no fence between those buildings, nor any enclosure around them; both of them, and the lot, being open to the street.

In *August*, 1809, the court, on the authority of *Garland's* case, (*Leach*, 130,) decided, that as the store was not within the *curtilage*, or no fence or yard enclosing the buildings, so as to bring them within one enclosure, the case did not amount to burglary.

Prisoner discharged.

Newel et al. case, (7 *Mass. Rep.* 245.)

2. The breaking and entering a dwelling-house, with intent to *cut off the ear* of an inhabitant, is not a felony.

The indictment, which was for *feloniously* and *burglariously* breaking and entering the dwelling-house of *Edward Dixon*, in *Boston*, in the night, with intent, unlawfully and feloniously to cut off one of his ears, and to maim and disfigure him, and for so breaking, entering and cutting off his ear, against the peace, *et contra formam statuti*; was demurred to, on the ground that the offence charged did not amount to a felony; and it was urged on behalf of the prisoners, that as *cutting off an ear* was not a felony, either at common law or by statute, that neither was the *intent* to do so a felony.

In *November*, 1810, after a consideration of all the authorities, and particularly those relating to the ancient doctrine of *mayhem*, Chief Justice *Parsons* delivered the opinion of the court, that as *cutting off an ear* was not a *mayhem*, because that organ was not necessary for fighting, that the offence laid in the indictment was not a felony at common law. Nor was it so by statute. The indictment is, therefore, bad.

Wilson's case, (*Coxe's Rep.* 439.)

At the *Oyer* and *Terminer*, at *Burlington*, in *New-Jersey*, in *December*, 1793, the following points were recognised as law, in the charge of *Kinsey*, Chief Justice, to the jury, in this case, which was for burglary, in breaking and entering the dwelling-house of *Daniel Cooper*, and stealing his goods:

3. (1.) If a man lifts the latch of an outward door, or if that door being open, he enters and unlatches or unlocks a chamber door, it is a sufficient breaking to constitute burglary.

4. (2.) If all the doors are open, and the thief enters and breaks open a chest or cupboard, this is not burglary.

5. (3.) To convict of this offence, it should be proved that the doors were shut.

6. (4.) If one takes the goods of another out of the place where they were put, though detected before they are carried away, the larceny is complete.

The prisoner was convicted and received sentence of *death*.

Pennock's case. (3 *Serj. and Rawle*, 199.)

7. The word *mansion-house*, in an indictment for burglary, is a good description of the premises—a *dwelling-house*.

This point was decided by the court, in *May*, 1817, on an application for a writ of error, one of the grounds for the application being, that in the indictment, which was for burglary, the premises, a *dwelling-house*, were described as a *mansion-house*. Motion denied.

8. Defined, i. 46

9. Branches of its definition relating to time and place illustrated, *ib.* n.

10. When the commission of this offence is rendered doubtful, in a case in which the goods stolen are found in the possession of the prisoner, it is safer to acquit him of burglary, and find him guilty of grand larceny, *ib.*

11. An indictment for burglary contained three counts, the first of which alleged the offence to have been committed in the dwelling-house of S., the second in that of J., and the third in that of H. On the traverse of the indictment, it appeared, that S., the landlord, living at a different place, hired the building to J. and H., by separate leases, and that the offence was committed in a part of the premises occupied by H. as a store, also living in a different place. There were separate outer doors to the store and entry; and on the side of the store there were two doors communicating with the entry, which entry was used in common by J. and H., the first of whom lived in a chamber above the store, communicating with the entry; but the inner store-doors were not in use, [illegible]

ving been closed. It was held, that breaking and entering the outer store-door in the night feloniously, was not burglary, i. 183

12. In an indictment for burglary, the ownership of goods belonging to A. and B. severally, may be stated as belonging, in the aggregate, to A. and B., without a separation of interests, ii. 45

13. It seems, that the breaking and entering a house in the night, feloniously, is the gist of this offence, rather than the consummation of the intent, *ib.*

14. In an indictment for burglary, the offence was stated to have been committed in the *tenth ward* of the city of *New-York*, and the evidence on the trial was, that the *locus in quo* was in the *sixth ward*. Held, that the indictment for that offence was defective, iii. 44

15. A store, in which no person slept, from which there is no communication into other rooms in the house occupied by a family, is not such a *dwelling-house* as that a burglary can be committed therein by a breach and entry, iii. 192

16. Removing a stick of wood from an inner cellar door, and turning a button, by which the door was fastened, in the night, with a felonious intent, is a sufficient *breaking of a house* to constitute burglary, though the outer cellar door may not have been fastened, iv. 62

17. To enter in the night, feloniously, through a chimney, into a store in the lower story of a building which, in the second story, and above the store, contains a room inhabited as a dwelling, is a burglary, though there be no communication from any part of the chimney which the prisoner descended, into such dwelling, iv. 63

18. To break into a store, from which there is a communication into a room occupied for sleeping by a clerk, belonging to the family of the owner of the store, whose family resides at a separate place, is a burglary, v. 10

19. In burglary, the ownership must be laid in the indictment in him who has an interest in the premises broken, either as owner or occupant, v. 167

20. An indictment for burglary alleged the house broken to be that of P., but it appeared that he, being the owner, had leased the lower part of the house to C. for a store, on the side of which there was a door leading into an entry, which communicated with the upper part of the house, where P. and his family lived; but that door, at the time the store was broken, was locked and secured by a nail, not having been usually a passage for going in and out. On the back of the store there was another door, leading into a yard common to both parties, and from which, by an outer door, there was also a communication into the apartments of P., the owner. *Quere*, Whether breaking into the store of C. is a burglary, vi. 1

21. It is a burglary to *break out* of a house, into which the thief entered in the night, with an intent to steal, though he did not break in entering, *ib.*

Phillips' case. (16 *Mass. Rep.* 423.)

22. An accessory in a capital felony cannot be put upon his trial without his consent, if the principal be dead without conviction.

23. Where a capital indictment had been continued one term, and the government was not prepared for the trial, the court took the prisoner's single recognisance till the next term.

These points were decided by the court, in *October*, 1820, in a case where the prisoner was charged as accessory before the fact, in *burglary* with one *Daniels*, the principal, whose death was alleged in the indictment. But as the points relate to the peculiar mode of proceeding in *Massachusetts*, in such cases, and to the practice of the court, a further view of the case is deemed unnecessary.

Certiorari.

1. No supersedeas to a conviction under the vagrant act, i. 153

2. Does not supersede an execution already executed, *ib.*

3. Issuing from the Supreme Court to the sessions, on the motion of two defendants indicted with another for a misdemeanor, is effectual for the removal of the indictment against the whole, though the third doth not participate in the motion, iv. 12

4. Proceedings on certiorari issuing from the Supreme Court into the sessions, and authorities relative to the effects of that writ collected, iv. 13, 14

Townsend's case, (1 *Johns. Cases*, 104.)

5. Where proceedings in a criminal case, not capital, were removed from the court of *Oyer and Terminer* to the Supreme Court; the judges ordered such proceedings to be returned and not put on file; for if they were, the trial must take place at bar, and not in the *Oyer and Terminer*.

In *April*, 1799, the proceedings in this case were removed into the Supreme Court, from the *Dutchess Oyer and Terminer*, where the prisoner had been indicted for, and convicted of perjury; and the judge before whom the case was tried, reported to the court that the verdict was against evidence.

The court ordered a new trial; and directed that the judge who was to preside at the then next oyer and terminer, in *Dutchess*, should communicate the opinion to the Justices of that court; and it was further ordered, that the proceedings be returned to that court, and not put on file. For, if they should be, they must remain, and the trial be had at bar, by a *Dutchess* jury; or, the court must send the case down to the *Dutchess circuit*. In a capital case, however, it could not be sent down for trial. (See *Ludlow's Case*, *Coleman's Cases*, 34. 2 *Saund.* 27. *n.* 2.)

Challenge to fight a Duel.

Gibbon's case, (1 *Southard*, 40.)

1. Whether the writing alleged to be a challenge to fight a duel, be such, or not, is a question of fact for the jury.
2. The *New-Jersey* act of 1796, "for the punishment of crimes," provides, "that if any person shall by word, message, letter, or in any other way, *challenge another to fight a duel*, with a rapier or small sword, back sword, pistol, or any other dangerous weapon; he shall be deemed guilty." &c. An indictment, under the act, in effect, charged the defendant *with writing and sending to the prosecutor, a paper writing*, (set forth *in hæc verba*,) *meaning and intending* by the said paper, a challenge to him to fight a duel with pistols; it was held, that the indictment did not charge the offence (*challenging*) created by the act.

On *certiorari*, to the *Essex* Oyer and Terminer, from the Supreme Court of *New-Jersey*, in *February*, 1818, an indictment was found against the defendant, charging him with having written a letter to *Aaron Ogden*, on the 26th *July*, 1816, in these words: "Sir, I understand that you have interfered in a dispute between Mrs. *Gibbons* and myself, which has been brought on by *John Trumbull* and wife. My friend, General *Dayton*, will arrange with you, the time and place of our meeting, *Thomas Gibbons*."—meaning and intending by the said paper writing, a challenge to the said *Aaron Ogden*, to fight a duel with pistols, &c. *contra formam statuti*.—The words of the act, material in the case, are above stated.

A motion was made to quash the indictment, on several grounds, among which were these:

1. That the indictment does not bring the offence *expressly*, but only by *intendment*, within the words of the act. 2. The writing set forth is not a *challenge*.

The court, after hearing the arguments of counsel, came to the following conclusion, as appears from the concurrent opinions of *Kirkpatrick*, Ch. J., and *Rossell* and *Southard*, Justices, that the indictment ought to be quashed, because it does not charge the offence created by the act. The indictment does not allege that the defendant *challenged Ogden* to fight a duel with pistols; it does not allege, that the paper was a challenge to fight, or that it contained such challenge; but merely, that the defendant wrote and sent it, *intending it as such*. The offence in the act is *challenging;* the charge in the indictment, is *writing and sending a paper intending to challenge*. The indictment, then, does not, acccording to the rule, *follow the very words of the statute*, nor *expressly charge the very offence created upon the defendant*.—With regard to the other point, whether the writing is a challenge or not, that is a question of fact for the jury. Such was the amount of the decision; but, as there was an informality in the return to the *certiorari*, a *procedendo* was awarded. The indictment was not further prosecuted. (See *ante*, 3 Vol. *City-Hall Rec. p.* 97.)

3. To write and deliver, or cause to be delivered, a letter or challenge to another, calculated and intended to incite and provoke him to fight a duel, is a misdemeanor at common law, iii. 90
4. The court will not order a *nolle prosequi* to be entered on an indictment for challenging another to fight a duel, where the party challenged is ready to

acknowledge satisfaction for the injury; this not being a misdemeanor within the statute, (1 Vol. R. L. p. 499. sect xix.) iii. 139

5. In whatever terms the writing, alleged as a challenge in the indictment, may be conceived and worded, the jury must recur to all the circumstances in the case, in determining whether it was intended as a challenge, *ib.*

6. Substance of statute relative to, *ib.*

See MANSLAUGHTER, 10.

Clerks of Sessions.

1. Statute imposing their duties, with regard to fines and forfeitures, extracted, ii. 107. n.

2. And of the court of *Oyer* and *Terminer* in *New-York*,—when the office was created, ii. 109

3. Divers statutes, collected, relating to the rights and duties of this officer, *ib.*

4. Clerk's application refused to have a committee of three appointed by the court to make a report touching his official conduct in relation to his receiving costs; by reason of a trial for a libel, which had then recently occurred in the same court, the defendant having published in his newspaper certain strictures against him for receiving illegal fees, ii. 130

5. It seems that such application is extrajudicial, and such report, if made, could not be acted upon, being a nullity, *ib.*

See COSTS IN CRIMINAL CASES. LIBEL, 11. 12.

Coining.

1. The possession of a die, or other instruments, for coining counterfeit Spanish dollars, *with an intent* to coin such money, is a misdemeanor at common law, iv. 42

2. To have in possession instruments for coining, with an intent to coin counterfeit money, is a misdemeanor at common law, v. 77

3. An indictment alleged that the prisoner had, in his possession, a die, made of *iron and steel*, with an intent to coin counterfeit money; but the die was made of *zinc and antimony;* it was held, that this indictment could not be maintained, *ib.*

4. There is no misjoinder in an indictment, the first count of which alleges that the prisoner counterfeited silver coin current in this state, and the second count, that he had in his possession the same coin with an intent to utter it; though the punishment for the offence specified in the first count, be imprisonment in the state prison for life; and the punishment for the offence specified in the second count, be imprisonment in the state prison for a term not exceeding seven years; but it seems that the public prosecutor will be put to his electing upon which of the counts he will proceed, vi. 63

5. Though a counterfeit coin be very unskilfully executed, still the offence is complete, if such coin be so far finished, and in such a state, that it is *calculated to deceive;* and whether it is, or not, is a question of fact for the jury, *ib.*

6. In such case, to establish the *scienter*, the public prosecutor will be permitted to show that counterfeit bank notes were found in possession of the prisoner, *ib.*

Compounding.

Pease's case, (16 *Mass. Rep.* 91.)

1. The accepting of a promissory note, signed by the thief, as a consideration for not prosecuting, is sufficient to constitute a compounding of a felony.

A motion for a new trial, and in arrest of judgment, was made and argued in *September*, 1819, after a conviction on an indictment, against the defendant, for compounding a felony, by taking as a consideration therefor, a promissory note signed by the thief, for $100. On the trial, it appeared that the note had not been paid; that the thief had died; and that it had since been presented to his executor for payment, who refused to pay, on the ground that, being given for an illegal consideration, it was void.

It was urged on behalf of the defendant, on the motion, that this offence was defined "The taking the goods stolen, or other amends, upon agreement not to prosecute." (4 *Black. Com.* 133.) Here, the goods were not restored *nor amends taken*, of any value. The note was void.

The counsel cited *Cony's* case, (2 *Mass.*

Rep. 523. 4 *ib.* 373, and 2 *Wilson*, 349.)

Sed per cur. : A promissory note is sufficient to satisfy the term "other amends." The gist of this offence is the concealing of the crime and abstaining from prosecution, to the public detriment. The cases cited are not parallel. The prosecution of an officer, for taking more than his legal fees, is a statute offence; and the taking a promissory note for such fees has been held not to be a *receiving* within the act. The fees may never be *received* if credit be given; but in this case, the *amends* are only *an incident to the crime*, which consists in smothering a prosecution and screening an offender from justice. The motion was overruled.

2. A misdemeanor cannot be compounded by the parties, unless through the special interposition of the court, or by the approbation and consent of the district attorney, ii. No. 2, 5
3. Where an assault and battery, which, in the judgment of the district attorney, was of an infamous nature, had been thus compounded, and the costs paid to the clerk, it was held that the former officer was not precluded from bringing on the cause to trial, *ib.*
4. A bargain made between a prosecutor and a felon, on his detection, that if he discover the concealment of stolen property, this shall not operate against him on trial, is obviously wrong, and will not be tolerated by the court, iv. 139

Confession.

Dillon's case, (4 *Dall. Rep.* 116.)

1. A confession made before a magistrate is not to operate against a prisoner, should the jury believe that threats or promises, previously made in prison, influenced such confession.

The prisoner, a boy, being committed to prison in *Philadelphia*, on a charge of *arson*, was visited by several citizens, who represented to him the enormity of his crime, urged a free, open, and candid confession, as a means of pardon; while a contrary course would leave him, in case of conviction, without hope; adding that they would stand his friends if he confessed. The inspectors of the prison, also, to obtain a discovery of his crime and that of his accomplices, carried him into the dungeon, displayed its horrors, and said that he would be confined in it, dark, cold, and hungry, unless he made a full disclosure; but if he did, he should have room, fire, and victuals, and might expect favour. He continued to deny his guilt some time, but at length, he made successive acknowledgments of the facts contained in his confession, which was formally, and, to all appearance, voluntarily made, before the mayor, on the succeeding morning.

On his trial, in 1792, before the *Oyer* and *Terminer*, the case was left to the jury, for them to determine, under the circumstances, whether the promises and threats, made previous to the confession, influenced it; and the jury acquitted him.

2. So, in the case of *Aaron*, a black boy, the slave of *L. Solomon*, (1 *Southard's Rep.* 231.) who was indicted for the murder of *S. Connelly*, a child of two years of age, by casting it into a well; on his trial at the *Monmouth* Oyer and Terminer, in *October*, 1817, it appeared that the prisoner was very *earnestly pressed* by the coroner's jury, and was told that he had better tell the whole truth to them. He steadily denied the act. His master and one of the jury took him aside, and asked him about it. He told them that he had done it; that *Stephen* went to the well and put his hands on the curb, and he took hold of his legs and threw him over, &c. He repeated this over and over to the jury. All the witnesses denied that either promises or threats, or improper contrivances were used to induce him to make the confession; but that he was frequently told to tell only the truth, and that it would be best for him. He continued two or three weeks to make the same confession, but at length began to deny the fact, and continued this denial till his trial. The case, after conviction, came before the Supreme Court of *New-Jersey*, and a motion was made for a new trial, on this, with other grounds, that those confessions ought not to have been received. Chief Justice *Kirkpatrick*, in his opinion, held the confession inadmissible, and a new trial was awarded.
3. Of a prisoner, made under the expectation of favour, when leading to other

facts, independent of such confession, such facts may be received in evidence, i. 28
4. Made under a promise of favour; reason why not received in evidence, *ib.*
5. When wholly relied on, must be taken wholly together, i. 66
6. Made under the influence of threats, which operated on the examination in the police, to be rejected, i. 149
7. Not sufficient, in itself, to produce a conviction for a felony, unless such felony is proved *aliunde*, i. 150
8. Of one indicted and tried with others, not to be received for the purpose of criminating the others, i. 173
9. Though confessions made in confidence to a divine of the Roman Catholic order, whose duty it is to receive auricular confessions according to the canons of that church, will not be received in evidence, yet, admissions made by a prisoner to a divine of the protestant churches, will be received, ii. 77
10. Made to a Roman Catholic divine, in the course of church discipline, cannot be given in evidence, ii. 80. n.
11. Not received in a conspiracy against three for defrauding a bank, where one of them, being arrested on a *capias*, went to the house of an officer of the bank, and remained voluntarily several days, and made a frank disclosure of all the circumstances, on the officer assuring him that he should be made a state's evidence against the others, and the confession was reduced to writing, and he declared it was made voluntarily, iv. 81
12. Immaterial whether one making a promise of favour be concerned in the administration of justice, or whether made in the progress of a prosecution, *ib.*
13. The court, in apportioning punishment, will look to the examination of all implicated in the felony, iv. 136
14. It shall be left to the jury whether a promise of favour continued its influence when the prisoner was examined before the magistrate, *ib.*
15. Where the magistrate, before whom a prisoner is brought, professes to take his examination according to statute, parol testimony shall not be admitted of what he said on examination; but a confession made before a magistrate, not reduced to writing, is good evidence, and he is a competent witness, iv. 139
16. Where two or more are charged with a felony, the examination before the magistrate of either of the prisoners, in favour of the other, or others, should not influence the jury, iv. 140
17. Parol evidence cannot be received of the information given before a magistrate, either in felony or misdemeanor, unless evidence be given that it was not reduced to writing, iv. 139. n.
18. A voluntary confession in a case of a misdemeanor, reduced to writing before a magistrate, though not a confession authorized to be taken by him under the statute, as in a felony, may be read in evidence, v. 5
19. Where the complaint of the prosecutor was reduced to writing in the police, and the confession of the prisoner followed, stating that "*the charge in the foregoing affidavit is true,*" and further, "*that he obtained goods by false pretences from several persons,*" not named in the indictment, it was held that such confession, so referring to an affidavit which neither was nor could be given in evidence, should have no influence with the jury, *ib.*
20. A confession made under the influence of threats, or promises of favour, is not to be received; but the fact of finding goods, in consequence of such confession, and by the showing of the prisoner, is good evidence, that being a fact independent of such confession, v. 164
21. Where a confession, made under the influence of a promise, is accompanied with the possession of the stolen goods, the prisoner is bound to account for such possession, v. 178
22. Where a confession is made in the police, subsequent to one extorted, it shall be left to the jury to determine, whether the prior influenced the latter confession; and, if it did, it is to be rejected, *ib.*
23. Confessions made under the influence of favour are not to be received; but confessions afterwards made to others,

not in presence of him who promised favour, are good evidence, vi. 69

See BIGAMY, 1. 9. 11. EVIDENCE. EXAMINATION.

Conspiracy.

Olcott's case, (2 *Johns. Cases*, 301.)

1. In a conspiracy against A. and B., B. was acquitted; but, the jury being unable to agree on a verdict, whether A. was guilty or not, the court, without his consent, ordered a juror to be withdrawn, and discharged the jury; it was held that, in a criminal case, the court may, in its discretion, discharge a jury, and that he may be again brought to trial for the same offence.
2. Where three conspired, and one of them died before trial, and another was acquitted, it was held that the third might be tried and convicted.
3. A verdict, in a case of conspiracy to defraud, that the prisoner conspired to obtain money, but with an intent to return it, was held to be void.

The prisoner and *A.* were indicted in the *New-York* Sessions, in *November*, 1800, for that they, with one *B.*, who died before the indictment was found, conspired to defraud the Bank of *New-York* of money. The two were brought to trial, when *A.* was acquitted; and, with respect to the prisoner, the jury, after remaining out from eight o'clock on *Saturday* evening, until near two on *Sunday*, returned a verdict, *that there was an agreement between the prisoner and B. to obtain the money, but with an intent to return it;* and, after being inquired of, particularly, whether they could agree to either a general or a special verdict, answered in the negative; when the court ordered a juror to be withdrawn, and the jury discharged.

In *July*, 1801, the prisoner being brought into the Supreme Court, on *habeas corpus*, his counsel moved for his discharge; and, after full argument, and on a consideration of all the authorities, Justice *Kent* delivered the opinion of the court, that the jury was properly discharged; and, though the opinion was confined to the case before the court, yet it will be found that he was inclined to the opinion that, even in a *capital case*, the jury, in a case of necessity, might be legally discharged, and the prisoner brought to trial for the same offence. This doctrine has been recently recognised, in the case of *Goodwin*, by Chief Justice *Spencer*. (*Ante*, vol. 5, p. 97.)

The second point was decided on the authority of *Rex* v. *Nicolls*, (*Stra.* 1227,) that one conspirator may be convicted after the death of the other; and the third point decided was, that the verdict offered was not such a one that any judgment could have been rendered on it, and it was therefore void.

Ward et al. case, (1 *Mass. Rep.* 473.)

4. It is a conspiracy, to combine to defraud a merchant of goods, by pretending that the conspirators were about to open a grocery store in *Portland*, for selling goods, for the term of one year, and that they had hired a store there for the purpose, &c.

The indictment was against *Ward*, *Roberts* and *Read*, in *May*, 1805, stating, in effect, that they conspired to defraud *William P. Davis*, of *Portland*, trader, of his goods, by pretending to him that they were about to open a grocery store in that place, for the vending and disposing of sundry goods and merchandises, for the term of one year next following, and that they had hired a convenient store for the purpose; and, in pursuance of the conspiracy, that they requested *Davis* to furnish them with the goods following upon credit: one pipe of gin, one pipe of brandy, &c.; that *Davis*, giving credit to their false affirmations, did deliver the goods, one quarter of the amount to be paid on the delivery, and the rest at sixty days; whereas they never intended to open a store, &c., but were vagrants, and idle, dissolute persons; and, after getting the goods, intended to sell them at an under value, and abscond, &c.

They were convicted, and sentenced to six months imprisonment, and to find security for their good behaviour for two years. (See 2 *Ld. Ray.* 1179. 3 *ib.* 325. 2 *East Rep.* 30.)

Judd et al. case, (2 *Mass. Rep.* 329.)

5. A conspiracy to manufacture base and spurious indigo, with a fraudulent intent to sell the same as good and genuine, is indictable, although no sale be made.

Motion in arrest of judgment was made, in *March*, 1807, on an indictment on which the defendants had been convicted for a conspiracy, alleging that they conspired to compound and manufacture a certain base material, in the form and of

the colour of *genuine indigo*, with intent to sell it at auction as such; and that, pursuant to said conspiracy, they purchased a zeroon of good indigo, of 200 pounds, and mixed it with starch, blue vitriol, nutgalls, allum, and a decoction of logwood, in such proportions and quantities as to make 600 pounds; and actually offered it for sale at auction; and the jury found them guilty of a conspiracy to make base and spurious indigo, with intent to sell it as good; but did not find them guilty of selling it at auction. The principal ground of the motion was, that the verdict did not support the indictment. The court, after argument, determined, that as the *unlawful confederacy* to do an unlawful act, or even a lawful one for unlawful purposes, is the gist of the offence, that it is complete when the confederacy is made; and any act done is no constituent part of the offence, but merely an aggravation. Chief Justice *Parsons*, who delivered the opinion of the court, referred to *Rex* v. *Edwards et al.* (8 *Mod. Rep.* 320,) *Rex* v. *The Journeymen Tailors*, (*ib.* 11,) and *Rex* v. *Robinson*, (1 *Leach*, 47.) See also the case of *Davis*, (*post*, 9 *Mass. Rep.* 415,) to the same point.

Tibbitts et al. case, (2 *Mass. Rep.* 536.)

6. In an indictment for a conspiracy, to accuse one of a crime, it is not necessary to allege that the defendants procured, or intended to procure, an indictment or other legal process.
7. Any informality or uncertainty in alleging the *overt acts*, will not vitiate the indictment for a *conspiracy*, as this is the gist of the offence, and the *acts* but matter of aggravation.

Motion in arrest of judgment, in *June*, 1807, on the ground that the indictment, which was for conspiring to accuse *Ichabod Rollins* of receiving stolen goods, and in pursuance of such conspiracy, falsely charging him with the offence in hearing of divers citizens, and fraudulently placing such goods under the floor of said *Rollins' dwelling-house or barn*, did not allege that the supposed conspiracy was entered into for procuring an indictment or other legal process; and that it is not specified whether the goods were deposited under the *dwelling-house* or *barn*.

The court denied the motion. A conspiracy to charge one with a crime, and falsely to affirm he is guilty, is an indictable offence, without procuring any legal process. (*Ld. Raymond*, 1169. 1 *Stra.* 195. 3 *Burr.* 1321.) With regard to the other point, they decided, that as the conspiracy was the gist of the offence, and the placing the goods but matter of aggravation, it was immaterial where they were placed. (2 *Burr.* 995. 1 *Leach*, 47.)

Kingsbury et al. case, (5 *Mass. Rep.* 106.)

8. Where a felony or a misdemeanor is in fact committed, a conspiracy to commit such felony or misdemeanor is not the subject of an indictment, as a distinct offence.

The defendants were indicted for conspiring to cheat and defraud *Thomas Pons* of two sets of harness, of the value of $500, in his shop being, under colour of authority from the said *Pons* to the defendants to sell the same; and the overt alleged was, that they did in fact obtain the harness, by means, which on the face of the indictment appeared to be felonious; and afterwards secreted it. The defendant was convicted, and in *March*, 1809, moved in arrest of judgment, on the ground that the offence charged amounted to larceny, which being a felony, the conspiracy is merged. (1 *Leach*, 108. *Ib.* 456. 2 *ib.* 608. 6 *Mod.* 77. *Hob.* 138.)—And by *Parsons*, Chief Justice. The offence charged amounts to a felony, and the misdemeanor is merged. Had the conspiracy not been effected, it might have been punished as a distinct offence. The judgment must be arrested.

Franklin et al. case, (4 *Dall. Rep.* 255.)

9. It is a conspiracy for men to combine together for the purpose of conveying, possessing, settling, and laying out townships on lands under a pretended title not derived from the state.

In *April*, 1795, the legislature of *Pennsylvania* passed what was commonly called the "*Intrusion Act*," prohibiting persons from possessing lands, or settling on them in certain of the northern counties, under colour of title not derived from the state, (many disturbances having occurred there by reason of what was commonly called the *Connecticut claim*,) and the defendants were indicted under one of the sections of that act. A jury of *Luzerne* county found a special verdict, by which the question was presented, whether

the act was constitutional or not; and the court, in 1802, decided, that the act was constitutional, and that the offence was indictable at common law, in aid of which the act was made.

Michael Hevice et al. case, (2 *Yeates' Rep.* 114.)

10. On an indictment for a conspiracy in inveigling a young girl from her mother's house by false pretences, and procuring the marriage ceremony to be recited between her and one of the defendants, she having been made drunk by them, the girl is a competent witness.

The facts in this case, charged in the indictment, and appearing in proof, were shortly these: *Catharine Spies*, being an infant of thirteen years, lived with her mother and step-father, (her own father being dead,) and was entitled to £1000 under his will. The defendants, six in number, conspired to inveigle her away; and after having done so, plyed her with wine, and induced her to be married to *Hevice* by the Rev. *Frederick Miltzheimer*. The next morning after the ceremony, she feigned an excuse to return to her step-father's, and could not be prevailed on to return home with *Hevice*, but cautiously avoided him. In about three months, *Hevice*, with his brother and brother-in-law, took the girl away by force from the mother's house, by night, and conducted her, with many threats, to a coal hut of the brother-in-law in the mountains, twenty miles off, where she was treated with great brutality.

On the trial, in 1796, she was produced as a witness for the prosecution, but was objected to on the ground that she was the wife of *Hevice*; and the marriage was offered to be proved by the clergyman, *Miltzheimer*.

The court decided, that the legality of the marriage was a question for the jury. Should they believe it to be fair and legal, then they would pay no attention to her testimony. She was admitted as a witness; and after a trial of five days, *Hevice* and two of the other defendants were convicted, and the others acquitted.

Eberle et al. case, (3 *Serj. & Rawle*, 9.)

11. Words used by one man are not evidence against another, unless they are proved to be engaged in a common enterprise; but in such case they are evidence, though not conclusive.

This, with other points, was decided by the Supreme Court of *Pennsylvania*, in *January*, 1817, on a motion for a new trial, in a case brought up from the Mayor's Court of *Philadelphia*. The indictment charged the defendant and fifty-eight others, in effect, for conspiring together to prevent, by force and arms, the use of the *English language* in the worship of Almighty God, in the "*German* Evangelical *Lutheran* congregation in and near *Philadelphia*;" and that at an election held for elders and wardens, the defendants assembled, and made a great noise, riot and tumult, &c. assaulting and beating some of the members of the church (named.)

Facts: Formerly, the worship had been conducted wholly in the *German*; but lately, there were two parties in the church: one in favour of introducing the *English language* in the worship, called the *English party*; and the other, opposed to this, called the *German party*. Each party held a number of meetings on the subject; and the *English party*, in theirs, had petitioned the corporation of the church to tolerate the worship in *English* and *German* jointly; and in some of these meetings, this party were disturbed by members from the other.

The *German party*, in one of their meetings, adopted an address in *German*, to the corporation, declaring, that they had firmly bound themselves before God, and solemnly to each other, to defend with their *bodies* and *lives*, their *German* divine worship, and to oppose, with all their power, the introduction of a strange language into their church. It was also proved, that Mr. *Manhardt*, one of the principal leaders in the *German party*, said, that "before they should preach *Irish* in their churches, blood should flow." *John Dunuk*, of the same party, said, that "*blood should flow*, before *English* preaching was introduced: that they would do as had been done in *London*,—have beer in the church, and fight like bull dogs." *Patrick Fligher*, and *Christian Smith*, of the same party, had also used similar expressions. Finally, at an election for officers of the church, persons of both parties being present, a vote was taken, on a motion made by one of the *English party*, for the appointment of *William Wagner*,

and another, as inspectors of the election, and the vote being carried, as was contended by that party, in attempting to enter the railing appropriated for the inspectors, he was forcibly opposed by the *German party*, and some acts of violence and tumult ensued.

It was urged, on the argument, among other things, that the defendants ought not to be held responsible for the declarations of the individuals before named.

Sed per Tilghman, Ch. J. (to this objection.) Such is the law, and it is founded in good reason. You cannot affect one man by the speeches of another, until you have proved that they were engaged in a common enterprise. That being proved, the words of one are evidence against the other, but not conclusive. It was in the power of the jury, if they found any thing which distinguished the case of some of the defendants from the others, to have acquitted them. But they have made no such distinction. Motion denied.

12. Defined, i. 169
13. A general understanding between two or more to rob and defraud others, is sufficient to support the particular charge, *ib.*
14. Need not be expressly proved, but may be inferred from the whole circumstances of the case, *ib.*
15. May be inferred from subsequent acts, i. 192
16. Committed where the defendants confederated to perpetrate an unlawful act, to the prejudice of the people generally, without naming any individual, ii. 22
17. To forge and defraud, must be inferred by rational men, from the performance of an act necessarily leading to a forgery or fraud, even against the testimony of an accomplice in the act, admitted as a witness on behalf of the prosecution, *ib.*
18. To obtain goods by false pretences, cannot be supported against a defendant, on the ground, merely, that in his examination in the police, he alleged that a man living with the person in whose name the goods had been fraudulently obtained by the defendant, *had told the defendant to go and obtain such goods*, ii. 54
19. Committed by confederating to cause or procure a vessel, not belonging to either, to be sent from this country to a foreign port, and there take on board, for a return cargo, certain rubbish, enclosed in bales or boxes, which, by a cunning contrivance and artifice, should be passed at the custom-house, with its mark, as and for genuine goods, corresponding in weight and bulk with such rubbish, and that such vessel, with such return cargo, should be insured, as and for genuine goods, and sunk on the high seas, for the purpose of defrauding the insurers, ii. 61
20. Whether the act of sinking or destroying a vessel at sea, by either of the conspirators, is, or is not, embraced within a statute of the United States, rendering such act a felony, is immaterial; a combination to perpetrate such act, is equally culpable as a misdemeanor, whether such statute exists or not, *ib.*
21. Immaterial whether the act designed to be effected, is to be perpetrated out of the jurisdiction of this state, or whether contrary to the statute or common law; and whether, at the time of the trial, the other conspirators are without the jurisdiction of the court or not: the prosecution against one, originally engaged in the conspiracy, may be maintained, *ib.*
22. An indictment for a conspiracy should allege, that some specific act, of a criminal nature, was agreed to be performed by the conspirators, or, that they agreed to accomplish some lawful purpose, by criminal means: otherwise, such indictment cannot be maintained, iii. 34
23. Indictment stating that C. and F. conspired to cheat O. and S. of their goods, by means of this, that C. should represent to O. and S. that he was in solvent circumstances, and able to pay his debts, and also, that H. and F. would endorse his note for the goods; and that, by reason of such representation, O. and S. parted with their goods on a credit—held bad on *demurrer*, *ib.*
24. Where two persons are indicted for conspiring *with other persons, to the jurors unknown*, to do an unlawful act, and the circumstances on the trial should not be sufficient to show that one of them conspired, should the jury be-

lieve that the other conspired with a person not named on the record, he may be found guilty, iii. 60

25. No person can be legally indicted for an intention to do an illegal act, unless he takes some step towards its consummation, *ib.*

26. Committed by a principal and his clerk, in confederating to deprive the prosecutor of checks by the clerk's holding out to prosecutor's agent, a check for those he held, as if to deliver it, and getting the checks in his hand, and then retreating and withholding all the checks, iv. 1

27. Where, on a trial for conspiracy, an injunction from Chancery was read on the part of the prosecution,—held, that the defendants were entitled to the benefit of the allegations in the bill, upon which the injunction was granted, iv. 12

28. Two or more must conspire, to do an act known to be unlawful; or facts must be shown, from which this may be inferred, *ib.*

29. It is not necessary that any step should be taken, iv. 121

30. D., indicted, for conspiring with G. and *persons unknown*, was tried separately,—held, that it was not necessary to show that he conspired with G., nor that there should be sufficient evidence produced to convict any one else, if on trial, *ib.*

31. Implies illegality; and, though usual, it is unnecessary to allege, in an indictment for that offence, that the conspirators *unlawfully* conspired, v. 112

32. To cheat and defraud an individual of his money, or goods, may be maintained, though the means by which the conspiracy was to be effected be not alleged, *ib.*

33. An allegation in such indictment, that the defendants did conspire, &c. "to cheat, defraud, and from him obtain $200," is sufficiently explicit to charge them with conspiring "to cheat and defraud" the person whose name in the indictment is the antecedent to the word *him*; this pronoun being understood immediately after the governing verbs "to cheat and defraud," *ib.*

34. Maintained, where it was agreed, that one of the conspirators, of no responsibility, should go to A. B. C. to purchase goods on credit, representing himself a man of wealth and credit, and uniformly referring to his co-conspirator, for the purpose of inducing the owners of the goods to trust them, that they might be deposited with the co-conspirators, v. 129

35. For several persons to agree, and bind themselves together by bond or covenant, to do or not to do that which, if done, or not done, would injure an individual or individuals, in person, property, or reputation, is a conspiracy, vi. 33

36. It seems that any confederacy to do that which will injure an individual, is a conspiracy; though it might be just and lawful for either of the parties to such confederacy, individually, to meditate and accomplish such act, *ib.*

37. On the traverse of an indictment for a conspiracy against several sailor boarding house-keepers, for combining and binding themselves together not to ship any seamen at the offices of certain notaries—it was held, that any abuses which might have been practised by such notaries in shipping seamen, furnished no defence, and could not be given in evidence, *ib.*

38. In a conspiracy, accumulative testimony may be introduced. vi. 43

A. and B. were indicted for conspiring to defraud C. of his goods; and on the trial, the public prosecutor, for the purpose of showing the *quo animo*, offered to prove that the defendants obtained the goods of D. E. and F., separately, by similar means to those laid in the indictment: it was held, that such testimony was proper. *ib.*

39. The Chief Justice of the Supreme Court concurred in the last point above, vi. 44. n.

40. Conspiracy to sink a ship at sea, ii. 61

41. Punishable with death, ii. 131

42. How far the sinking a ship at sea, to defraud Insurance Companies, is contrary to the first and second sections of the *United States* statute, when done by the Captain with the concurrence and assistance of the owner, then on board, *ib.*

See CONFESSION, 11.

Costs in Criminal Cases.

1. Bill of costs, ii. 101, 102
2. Practice in the Court of Sessions, in *New-York*, has been to charge defendants with the costs of continuing their recognisances from day to day, ii. 102. n.
3. This seems not to be the legal object of a recognisance, ii. 108
4. Rule on the subject of charging a defendant with costs, who has been acquitted, ii. 102. n.
5. *Quere.*—Whether a party indicted in the Court of Sessions, who is acquitted by verdict, or otherwise, is bound by law, in any case, to pay costs? ii. 89
6. But now, by a recent act of the legislature, a defendant, acquitted on a criminal charge, is discharged without paying costs.
7. A former clerk of the sessions, who was sued in the justices' court for receiving the costs on recognisance in a case where *no indictment was found*, and a recovery having passed against him, reversed the judgment in the Supreme Court, on *certiorari*, v. 65

IN CIVIL CASES.

8. On proceedings on the bail bond, when to be paid *instanter*, iii. 156
9. Though the costs are to be paid by the defendants *instanter*, where proceedings are set aside on the bail bond on the usual terms, yet a default entered in the original suit, *on the same day* the order of the court, setting aside such proceedings, is entered, was held *irregular*, *ib.*
10. It seems that a party, on whom the terms of paying costs *instanter* are imposed by an order of the court, is entitled to at least *twenty-four hours*, *ib.*
11. Where the attorney for the plaintiff, immediately after the court had set aside proceedings on the bail bond, on the payment of costs, entered a default in the original suit, and subsequently received the costs of such proceedings of the defendant, to whom the entry of the default was unknown, it was held that the reception of the costs was a waiver of the default, *ib.*

See CLERK OF SESSIONS. RECOGNISANCE.

Description of Property.

Richards' case, (1 *Mass. Rep.* 336.)

1. An indictment for larceny alleging that the prisoner stole "*a bank note*," is sufficient, without a more particular description of the note.

Motion in arrest of judgment, on appeal from a judgment rendered in the municipal court of *Boston*. The indictment was for larceny, in stealing from the person of A. B. "one bank note of the value of $10, of his goods and chattels;" and the principal ground taken was, that the note was insufficiently described, inasmuch as it did not appear to have been issued by any bank authorized to issue bills, &c.

Sed non allocatur, per Sedgwick, J. This is a sufficient allegation of property and value, and, in my opinion, as particular a description as the law requires. *Strong*, J. said, the question with him had been, whether the indictment ought not to have averred that the note was for the payment of money; but he had found no authority directly in point. He was inclined to think that a *bank note* always meant a note for the payment of money. Motion denied.

2. On the traverse of an indictment *for stealing a hog*, it appeared that, at the time the felony was committed, the animal was dead and partly dressed: held that the description in the indictment was sufficient, ii. 168
3. It seems, that the common acceptation of the name of property, governs the description thereof in an indictment, *ib.*
4. The common acceptation of the name of an article of ware among artisans engaged in its manufacture, is sufficient in an indictment, iii. 92

See LARCENY, 13.

Distress.

1. Though the landlord hath a right, after distraining, to impound the goods on the premises, he hath no right, by colour of such distress, wholly to dispossess such tenant, and bar him from the enjoyment of the premises, ii. No 2. 4
2. When the officer who makes distress has the goods of the tenant, and the keys of an inner room for depositing them, voluntarily delivered him by such tenant, such officer afterwards has

a right of access to the goods, nor can the tenant legally prevent him, vi. 6

3. No landlord can legally detain goods in the possession of the tenant, on the premises, unless he has a right to distrain, vi. 29

4. To entitle a landlord to distrain, it is necessary that he should previously make and file an affidavit that a specific sum is due for rent, *ib.*

5. The landlord, even if rent be due, has no right to assault one who came to take away goods he had sold to the tenant, but who, being unable to pay for them, had given liberty to him to take them away, *ib.*

See POSSESSION, 5. 7.

District Attorney.

1. The first section of an act of 1813, "relative to district attorneys," divided the state into districts, in each of which a district attorney was to be appointed, and *Suffolk*, *Kings*, *Queens*, and *Richmond*, constituted one district. The third section provided payment for his services. By an act of 1815, *New-York* was declared to be a district by itself, and that a district attorney should be appointed there, and one was so; but in 1818, "an act to amend an act relative to district attorneys" was passed, providing that a district attorney should be appointed in each county, who should enter on the duties of his office on a specified time, and repealing the first section of the act of 1813; and another district attorney being so appointed, claimed to exercise his official duties at the time specified in the act;—held, that by a *necessary implication*, the act of 1818 repealed the act of 1815, under which the former district attorney claimed to hold his office, iii. 113

2. An act may repeal another by a necessary implication, though it contain no repealing clause, *ib.*

3. Where the incidents appertaining to an office, created by a prior act, are subtracted by a subsequent statute, the office ceases, *ib.*

4. The new, need not serve the old, district attorney with a supersedeas, *ib.*

Evidence.

Drake's case, (15 *Mass. Rep.* 161.)

1. The confessions of a party, voluntarily made to members of the same church, may be given in evidence on his trial for the crime or misdemeanor so confessed by him.

On a motion for a new trial, made in *May*, 1818, on the ground that penitential confessions, made by the defendant to members of his own church, when none others were present, had been received on the trial, which was for *an act of open and gross lewdness*, under the *Massachusetts* act of 1784, c. 40; it was urged by his counsel, that such confessions ought not to have been received, because it was an infringement of the rights of conscience. He was obliged in conscience to confess. It was enjoined on him, *pro salute animæ*.

The court, after consideration, denied the motion, and the defendant was sentenced. See 3 *Johns. Rep.* 180. 2 *City Hall Rec.* 77. *ib.* 80. n. 5 *ib.* 52.

Moulton's case, (9 *Mass. Rep.* 30.)

2. The party from whom goods have been stolen is a competent witness, as to any facts within his knowledge, on the trial of the offender.

This point was raised in the Supreme Judicial Court, in *May*, 1812, on a motion to set aside a verdict, because the owner of the goods was admitted as a witness, in a case of larceny; but the court said, the objection had often been made, and as often overruled. This objection was never made in the state of *New-York*, in any court, as far as can be ascertained.

3. Before introduced, counsel should ascertain its legal bearing and effect, i. 62

4. Of the child against the parent, or the brother against the sister, heard by the court with much reluctance, i. 105

5. Of the wife, to impeach that of her husband, inadmissible, i. 121

6. Of a perjurer, in a prosecution for subornation, entitled to credit, when confirmed by other evidence, *ib.*

7. So of an accomplice in a felony, i. 133. *et passim.*

8. May be introduced by the plaintiff, after he has rested his cause before a jury, i. 11

9. Tide tables calculated by scientific authors, may be read in evidence, *ib.*

10. Parol evidence, not admissible to show

that a counterfeit bill was passed, without producing the bill, i. 46

11. When several are indicted, and on their trial no evidence is produced against one, he may be sworn in favour of the other, i. 62

12. May be introduced on behalf of the prosecution, after the counsel on behalf of the prisoner have closed the defence; and by the prisoner, at any stage of the prosecution, before the jury has retired, i. 110

13. The existence of the former cause, on the trial of which the perjury is assigned, must be proved by the record, if insisted on by the counsel for the defendant, and cannot be proved by the minutes of the court kept by the clerk, i. 191

14. An inquest will not be set aside, on the ground of newly-discovered evidence, where the witness to the fact relied on, was examined on such inquest, though such fact may not have been elicited, v. 85

15. Declarations made by the prisoner at the time an offence is committed, may be given in evidence in his favour, as part of the *res gestæ*, but not those made subsequently, v. 171

16. To prove that bank bills, received as good by the prosecutor, were stolen by the prisoner, is sufficient, without otherwise showing that they were *of value*, iv. 132

17. At any stage in a criminal case, rests in the sound discretion of the court: and where the testimony had closed on both sides, and the counsel for the prisoner, in his remarks to the jury, insisted on an acquittal, because the District Attorney had not proved that the property belonged to the person mentioned in the indictment; it was held, that he might recall and examine the principal witness in the case to that point, inasmuch as this omission, during his previous examination, was the result of mistake, v. 164

18. Where there is ample testimony, which is not impeachable, to support that which is necessary to establish, to produce additional testimony, but of a contrary character, may destroy the case, especially if this additional testimony be relied on, v. 166, and see i. 62

19. Counsel have a right to put a question to a witness, the answer to which, if true, might have a tendency of criminating or degrading him; but he is not bound to answer, vi. 45

Sed vide contra, i. 66. 134

20. The best evidence the nature of the case will admit, should be produced, vi. 65

21. Secrets confided to counsel cannot be given in evidence, i. 121

22. What has been done or omitted by a former grand jury, in relation to a complaint for the offence with which a defendant stands charged, and is on trial, cannot be received in evidence, iv. 154

23. Where a note, which had been protested at the bank, originally came into the hands of M., an attorney, from his client D., one of the indorsers, and N., another of the indorsers, against whom a suit is commenced, and a judgment by confession entered, satisfies the judgment, and then requests M. to collect the money due on the note of the maker, and is afterwards indicted for perjury, on the trial of which it is necessary to produce the note; it was held, that M. could not withhold it on the ground of professional confidence, iv. 168

24. To render a record of a former conviction or acquittal good evidence, it is necessary that it should be signed by the presiding judge who tried the case, and be put on file; and, on the trial in which it is offered in evidence, should be taken from the files of court, and produced by the clerk, vi. 30

25. A record of conviction for a felony, in that part containing the judgment of the court, should show that the prisoner was sentenced for a felony; and, in a case where, by mistake, the appropriate word was omitted, it was held, that such record could not be amended, especially after the jury was sworn, vi. 101

26. The statute concerning amendments and jeofails (1 *R. L.* 117.) will not authorize such amendment, *ib.*

27. It is a general rule, that after the counsel on both sides have submitted their remarks to the jury, fresh testimony cannot be introduced; but this is a matter of discretion with the court, vi. 91

28. After the counsel on either side have

addressed the jury, testimony of a fact, concerning which such counsel must have been previously apprized, will not be received, vi. 91

29. Where, during the pendency of a suit for a breach of promise of marriage, a relative of the defendant commenced a conversation with him concerning a compromise, as if authorized by the plaintiff, which was not so, and the defendant admitted the contract sought to be enforced, and offered a sum, by way of compromise; it was held, that the admission and offer of the defendant might be given in evidence, and were to be viewed rather in the light of a *confession*, than *the mutual offers of compromise between parties*, iii. 193

30. *Quere*—Whether a notice from the defendant to the District Attorney, to produce, on the trial, a paper, supposed to be in the possession of the prosecutor, who has received a similar notice, but denies the existence of such paper, will be sufficient to authorize the defendant to prove the contents of such paper by parol testimony? ii. 171

CIRCUMSTANTIAL.

31. Extraordinary concurrence of—strong, ii. 21. 132

32. Rule of law, relating to circumstantial testimony, in a criminal case, laid down, ii. 143

33. The common rules, in relation to circumstantial testimony, are obligatory on juries, notwithstanding the fallibility of such testimony, *in extreme cases*, may be shown from theoretical writers, ii. 149

34. Should be relied on by courts and juries, ii. 152

35. Fallacy of producing extreme cases, to show that circumstantial proof cannot be relied on, exposed, ii. 151. n.

36. To convict a prisoner of a felony, it is incumbent on the public prosecutor to show that a felony has been committed, iii. 137

37. Where circumstances are relied on by the public prosecutor to establish the commission of a felony by the prisoner, they must be such as are reconcileable with his guilt only, and are utterly inconsistent with his innocence, *ib.*

38. In a case wholly depending on circumstances, they must be such as are consistent with guilt only, iv. 91

39. Of good character, valuable in a doubtful case, i. 11

40. In a clear case of guilt, of no avail, i. 82

41. Sufficient to repel the presumption of guilt, in a prosecution for passing counterfeit bills, where the circumstances are slight, on which the *scienter* is founded, i. 132

FROM COMPARISON OF HANDWRITING.

42. Where a witness on behalf of the prisoner, on trial for the forgery of a promissory note against the witness, declared that such note was in his own handwriting, the court would not, on the suggestion of the District Attorney, permit the witness to write a similar instrument and submit it, with that alleged to be a forgery, to the inspection of the jury, though this course was consented to on behalf of the prisoner, iv. 119

43. The jury cannot determine whether an instrument is a forgery or not, from mere comparison of hand writing; especially where they have higher evidence, *ib.*

44. Where, on the traverse of an indictment for larceny, the owner of the goods doth not appear, the prisoner will be allowed to show that, immediately after the felony was alleged to have been committed, the owner acquitted him from blame, and alleged that he was satisfied; having found the goods about his own person, iii. 153

See AFFIDAVIT, 4. ASSAULT AND BATTERY, 7. 12. 24. 36, 37. BIGAMY, 1. 6. 8. CONFESSION. CONSPIRACY, 11. 27. 30. 37. FORGERY AND COUNTERFEITING, 61. INSURANCE, 3, 4. LARCENY, 2. 14. MANSLAUGHTER, 4. NUISANCE, 2. 4. PIRACY. POSSESSION. SCIENTER. SLANDER, 2. 7. 11.

Examination.

1. A prisoner in his examination before the police magistrates, is not bound to answer any question, the answer to which, if true, would implicate himself; but if he submits to answer, and answers falsely, the public prosecutor may produce evidence to disprove such

examination; and it will then be taken strongly against the prisoner, i. 81
2. That which in an examination appears to be a mere excuse, framed by the defendant for his conduct in a fradulent transaction, can never support a material allegation in an indictment, which requires positive proof, ii. 54
3. The written examination of a witness, in a criminal prosecution, taken before a magistrate, cannot be read in evidence to fortify the oral testimony of such witness, without producing the magistrate before whom such examination was taken, ii. 61
4. The magistrate before whom an examination is taken, is a competent witness to testify to acts done by the prisoner before him, but not to declarations forming part of such examination, v. 171
5. Where a prisoner, in his examination before a magistrate for a specific offence, discloses matters material to the prosecution on the traverse of an indictment for another offence, it was held that such examination might be read on the traverse of each indictment, *ib.*
6. Examinations of prisoners before a magistrate stand on the same footing, in courts of justice, as their declarations reduced to writing before any individual would, *ib.*
7. Whatever is reduced to writing before a magistrate, and forms part of the examination of the prisoner, is not the subject of parol testimony, v. 174

See CONFESSION.

Execution.

1. Where a constable or marshal prosecutes for a personal injury committed on him while in the prosecution of the duties of his office, he should produce, on the trial, the process under which he acted; otherwise the result may be that he himself was the trespasser, ii. 165
2. Though the judgment, on which an execution has been issued, be void, yet the officer is not a trespasser while in the due discharge of his duty in executing such process, and is protected by law, iii. 56
3. A sheriff or other general officer, while serving process, is not bound, by law, to show it, though it is, generally, discreet to do so; but this rule doth not apply to a person having a special authority, iii. 56
4. For an officer, with an execution, merely to call on a debtor with it, and take no inventory, is no levy on the goods, and if he afterwards break open the door to seize the goods, he becomes a trespasser, v. 141

See ASSAULT and BATTERY, 28, 29. CERTIORARI, 2.

Extortion.

Rust's case, (1 *Caines' Rep.* 131.)

1. An indictment against an attorney, for extorting more than his legal fees, must state the sum due, and the specific excess.

The defendant, an attorney of *Montgomery* Common Pleas, having been indicted in the Sessions of that county, for extorting from *Alexander Campbell*, defendant in a certain cause, $11 over and above the fees usually paid for such like services, and due in the suit aforesaid, and more than was legally due to him (*Rust*) and the other officers and ministers of the said court, for their respective services in the said suit; contrary to the act, &c. was convicted and fined $100. He removed the record of conviction into the Supreme Court by writ of error; and, in *August*, 1803, the court, after argument, decided, that inasmuch as the indictment did not specify how much was received *on his own account*, and how much for the other *officers of court*, it was defective. The judgment of the Sessions was therefore reversed.

Cony's case, (2 *Mass. Rep.* 523.)

2. The receiving a negotiable promissory note by an officer for fees not due, will not support an indictment for extortion.

Motion for a new trial before the Supreme Court, in *June*, 1807: The conviction was for extorting from J. C., for the service of an execution, $9 17, when there was due no more than one dollar; and it appeared that a promissory negotiable note was given by J. S. for these fees. The principal question was, whether the receipt of such note would constitute the offence. *Et per Curiam*: To constitute this offence, at common law, there must be

the receipt of money or something of value. This note, when made, was *ipso facto* void: (*Co. Litt.* 368. b.)

Motion granted.

Feme Covert.

Trimmer et al. case, (1 *Mass. Rep.* 476.)

1. Feme covert not chargeable jointly with her husband.
2. Removing a plank which is loose and not fixed to the freehold is not a breaking within the statute.

The prisoner, S., his wife, and P. W. were indicted for breaking and entering the store of *Joseph Haley*, with intent to steal his goods.

The court directed that S. be acquitted, because charged jointly with her husband; and it appearing in proof that the prisoners removed a loose plank, in a partition wall of the building, which plank was not fixed to the freehold, the jury acquitted P. W. of the breaking, and found her guilty of the simple larceny and acquitted *Trimmer*. See also the case of *Neal et ux.* (*post*, 10 *Mass. Rep.* 152.) where it was decided (in *May*, 1813,) that a feme covert is not indictable for an assault and battery, committed in the company and by command of her husband.

3. Reason why husband and wife shall not give evidence for or against each other, in civil causes, i. 107
4. Husband or wife, in case of a personal injury committed by one on the other, may appear, in a criminal prosecution, as witnesses against each other, *ib.*
5. When the husband appears as a witness, the wife will not be admitted as a witness, for the purpose of impeaching his testimony, directly or collaterally, i. 121
6. Admitted as a witness for one on trial with her husband, i. 177
7. Being a material witness for one indicted with her husband, the court will grant a separate trial, *ib.*
8. A woman, in the presence of her husband, cannot be guilty of an assault and battery on another with whom the husband has a controversy, iii. 56
9. The wife cannot be convicted of an assault and battery on one who, at the time, was engaged in a conflict with the husband, or attacked by him, iii. 128
10. The doctrine laid down rather too broadly above, iii. 134
11. Where the wife commences an assault and battery, or is engaged in an affray in the presence of the husband, in which he doth not participate, she may be convicted; but when she comes in aid of the husband in an affray wherein he is engaged, she is presumed to act under his influence, and cannot be convicted, *ib.*
12. On the traverse of an indictment against husband and wife, for keeping a disorderly house, it is necessary for the public prosecutor to show either an active co-operation on the part of the wife, with her husband or others, in producing disorder, or that it was of that peculiar nature which must have been the necessary result of such agency on her part: otherwise, she cannot be convicted, *ib.*
13. Though *the wife* who aids, abets, and assists the husband in the commission of a felony, *is presumed* to act under his control, and is not to be charged as a felon, yet a *mistress*, who, perhaps, in fact, is more under the control of the man than the wife, is not thus sheltered, iv. 140
14. Though there are articles of separation between husband and wife, yet the ownership of goods stolen from her must be laid in him, iv. 142

See Assault and Battery, 3. Infant. 1, 2. Robbery, 17. Receiving Stolen Goods, 9.

Fishery.

M'Curdy's case, (5 *Mass. Rep.* 324.)

1. Acts for the preservation of fish, imposing penalties for the breach of them on all persons offending, are public acts, and need not be set out in an indictment.

The defendant was convicted under the act of 1797, (c. 70. sect. 4,) for the preservation of salmon, shad, and alewives, in the waters of *Lincoln* county, the preamble to the second section of which act recites, that the preservation of the fisheries *there* is of *great importance to the public*; and the indictment charged him with having caught eight shad and eighty-five

alewives in the waters of *Cathance* river, in that county, against the statute. This act was not set forth; and it was urged in arrest of judgment, in *June*, 1809, that the act was a private one, and ought to have been set forth.

Sed non allocatur; et per Parsons, C. J.: This is a public act: indeed, all our fish laws, imposing penalties on persons offending against them, are made for the public benefit, and are public acts.

Motion denied.

2. The citizens of *New-York* have the right of fishing in any of the waters of the bay, without interruption, vi. 4
3. *Bedlow's* island was ceded by the State of *New-York* to the *United States*; but this cession did not include any land covered by the waters of the *Hudson*, *ib.*
4. Where an officer in the service of the *United States*, at *Bedlow's Island*, ordered one of his soldiers to take a barge, and keep certain oyster boats, engaged in oystering, off from the island beyond certain stakes set down adjacent to the island as bounds, and not to suffer them to oyster within such stakes, and the soldier, by force, towed an oystering boat beyond the stakes, and when the oystermen afterwards came purposely within the stakes, towed the boat on shore, it was held that the officer was guilty of an assault and battery on the oystermen in such boat, *ib.*

Foreclosure of a Mortgage.

1. Statute relating to foreclosure, ii. 153
2. The *six months*, contained in the sixth section of that statute, are months of twenty-eight days each, or lunar months, *ib.*
3. Authorities on the subject collected, ii. 154
4. The sixth section of the "act concerning mortgages," (1 vol. *R. L.* p. 374.) prescribing the mode of foreclosure, directs, that "every such sale shall be at public auction or vendue, and public notice shall be given thereof by advertisements, one copy thereof to be inserted and continued, at least once a week, *for six successive months* previous to the sale, in one of the newspapers published in the county where the mortgaged premises lie," &c. It was held that the term months in that statute meant lunar months, iii. 1
5. Opinion of the Supreme Court, iii. 72

Forgery and Counterfeiting.

Franklin's case, (3 *Johns. Cases*, 299.)

1. In an indictment for forging a bill of exchange or bank bill, it is unnecessary to insert the marks, letters, or figures, used in the margin for ornament, as these form no part of the bill.

The prisoner being indicted for the forgery of a bill of exchange, the marginal ciphers used for ornament, and for the purpose of rendering the detection of forgery more easy, were omitted in the description of the bill in the indictment; and on an objection taken, on the ground of a variance, the Supreme Court, in *January*, 1803, decided, that it was unnecessary to insert the marginal ciphers or marks in the indictment; for they make no part of the bill. It might as well be required that a *fac simile* of the *watermarks* and of the *engraved ornaments* to a bank bill should be inserted. (See *Bailey's* case, 1 *Mass. Rep.* 62. *Stevens'* case, *ib.* 202, where the same point may be found decided.)

Burling's case, (1 *Johns. Rep.* 320.)

2. It is not necessary, in an indictment for forging a *check*, drawn in the name of a firm, to set out all the names of the partners as the persons whom the prisoner intended to defraud; for, by our act, the forgery is complete if it be done with intent to defraud *any person*.
3. If one count in an indictment be good, and others bad, the good count is sufficient to support the general verdict of guilty.

The prisoner was convicted at the Oyer and Terminer of *New-York*, in 1806, for forging a check on the *Manhattan Company*, signed "*Daniel Ludlow & Co.*" The two first counts were for forgery; the first with an intent to defraud *Daniel Ludlow* and *Daniel Ludlow, junior*, and the second with intent to defraud the president and directors of the *Manhattan Company*, and the fourth count charged the uttering with an intent to defraud *Daniel Ludlow*. It appeared that *Ludlow Dashwood* was one of the firm.

The cause being removed by *certiorari*, it was objected, on a motion in arrest of

judgment, that in the first count *Dashwood's* name was omitted; that in the fourth count, the names of two of the partners were omitted; and that in the second count the intent stated was not sufficiently descriptive of the persons intended to be defrauded.

In *May*, 1806, the Supreme Court decided that it was not necessary to state an intention of defrauding every individual of the company Forgery, by the act, is complete, if done with intent to defraud *any person;* and as these counts were good, they were sufficient to support the verdict, though the others might be bad. (*Doug. Rep.* 730.) Motion denied. (See *Jacob S. Redington's* case, *ante*, p. 107.)

Howell's case, (4 *Johns. Rep.* 296.)

4. Two or more on trial, who are not entitled to a peremptory challenge, may be tried jointly or severally, in the discretion of the court.
5. *Quere.*—Whether in a capital case, two can be tried together without their consent?
6. A check was forged against B., and the money got out of the bank thereby; but, before it reached the prisoner, the bank, ascertaining that the check was a forgery, got possession of the money, without the direction of B., whom they credited with the money charged to him on paying the forged check. It was held that B. was a competent witness to prove the forgery.

The prisoner, with one *Mitchel*, was indicted in the *New-York* Sessions for forging a check on the Merchant's Bank for $685, in the name of *Benjamin Butler.* On the trial, he moved to be tried separately, but the court tried him with the other, and he was convicted, but *Mitchel* was acquitted.

Having sued out a *habeas corpus*, he was brought into the Supreme Court, in *May*, 1809, and his counsel moved for his discharge, on two grounds, one of which arose from the facts, which appeared, shortly, to be these: *February* 28, 1809, one *Guest*, in *New-York*, received a letter from *A. Cooper*, (dated *New-Brunswick, N. J.*) containing the forged check, directing him to get the money, and to retain $35, and remit the balance to *Cooper*, by letter, directed to the care of *De Graw*, an innkeeper in *New-Brunswick.* He did so; and the amount of the check was charged by the bank to *Butler*, who kept an account there. On the 3d of *March*, *De Graw* received a letter from *Cooper*, in *New-York*, directing him to send the money by mail to that city, to one *S. Fordham.* This was done. In the mean time, *Butler*, on examining his account at the bank, declared the check a forgery. The bank immediately took such measures, that on the 4th of *March* they seized *Fordham's* letter at the post-office, and got the money; and on the 7th, credited *Butler* the whole amount of the check. He was offered as a witness on the trial, but his testimony was objected to, on the ground of interest; but after a release from the bank, it was received. The two principal points, therefore, were, 1. Whether the prisoner was legally tried with *Mitchell?* 2. Whether *Butler* was a competent witness? After argument, Chief Justice *Kent* delivered the opinion of the court, that this was not a case in which the prisoner was entitled to a peremptory challenge, and, therefore, he might be tried jointly or severally, in the discretion of the court. On the second point, that though it had been the doctrine in *England* and in this country, that on a trial for *forgery*, the person whose name was alleged to be forged was not a competent witness, yet the question of interest in a witness had been recently investigated and defined with more precision, both in *England* and in this state. The interest now, in a criminal case, goes to the credit and not to the competency of the witness. The exclusion of a witness in *forgery*, on the ground of interest, has become an anomaly in the law of evidence. But in the case before the court, *Butler* had no interest. The bank had paid him the whole amount of the check, &c. Judgment, state prison for fourteen years.

N. B. Since this case, it has uniformly been considered the law, and such is the practice in the Sessions: 1. That prisoners indicted together, in any case, are not entitled, as a matter of *right*, to a separate trial. (1 vol. *City Hall Recorder*, 144. 177.) 2. That the person whose name is forged is a competent witness to prove the forgery, and that without a release. See also the case of *Ross.* (2 *Yeates' Rep.* 1.) decided in the Supreme Court of *Pennsylvania*, in 1795, to the same point; but it was further holden that the *indorser* of a forged note

was not a competent witness, in a trial for its forgery, until he had paid the amount, and taken up the note.

Shaw's case, (5 *Johns. Rep.* 236.)

7. Forging a paper in these words, "Mr. S., Let the bearer trade $13 25, and you will oblige," &c. is forging an order for the delivery of goods within the act.

The prisoner was indicted and convicted at the *Orange* Oyer and Terminer for forging an order for the delivery of goods, as follows—"Mr. *Seward*, Sir, Let the bearer trade thirteen dollars twenty-five cents, and you will much oblige yours, &c. *August* 16, 1809, *Samuel Layton.*" Judgment was respited, and the prisoner was brought up on *habeas corpus*, in *November*, 1809, and a motion was made in arrest of judgment, on the ground that this was not an order for the delivery of goods within the act. The court decided that it was such an order, and that its terms were sufficiently explicit. (2 *East's P. C.* 941. 1 *Leach*, 63.) He was sentenced to the state prison for five years.

Finch's case, (5 *Johns. Rep.* 237.)

8. Forging a paper in these words, "Due J. F. $1 on settlement this day," &c. is forging a note for the payment of money, within the act.

The prisoner was convicted at the *Orange* Oyer and Terminer for forging a note for the payment of money, as follows: "Due *Jacob Finch* one dollar, on settlement this day, *February* 7, 1809, *David Knight.*" The prisoner being brought up on *habeas corpus*, in *November*, 1809, it was moved in arrest of judgment that this was not a note for the payment of money, within the act; but the court decided that it was, and he was sentenced to the state prison for five years.

Wilson and *Osborn's* cases, (6 *Johns. Rep.* 320.)

9. Where a public act prohibits the circulation of any bank bill or promissory note of any banking company, for the payment of a sum less than a dollar, it was held to be no offence either to forge or utter a bank note of another state of that description.

The prisoners were severally convicted at the *Washington* Oyer and Terminer of forging and uttering a forged note, purporting to be a bank note of the *Vermont* State Bank, for 75 cents. At that time, there was an act (*Laws N. Y.* sess. 30. c. 173.) prohibiting the circulation of such bills, on pain of forfeiting the amount, with costs; and the prisoners being brought up on *habeas corpora*, in *August*, 1810, the Supreme Court decided that it was no felony to forge or utter such bills, and the prisoners were discharged.

Farrington's case, (14 *Johns. Rep.* 348. 2 *City-Hall Rec.* 155.)

10. Forging an order in these words: "Pay to *John Low*, or bearer, $1500 in *N. Myers'* bills or yours,"—is not within the act; as it is not an order for the payment of money or the delivery of goods.

On *habeas corpus:* the prisoner was convicted at the *Dutchess* Oyer and Terminer for forging an order in these words: "*Poughkeepsie, June*, 1817. To the Cashier of *Levi M'Kean's* exchange office, pay to *John Low*, or bearer, fifteen hundred dollars, in *N. Myers'* bills or yours.—*David B. Lint.*"

The Supreme Court, in *October*, 1817, decided that this was neither an order for the payment of money, or the delivery of goods, within the act; and the prisoner was discharged.

Flanders and *Hauy's* cases, (18 *Johns. Rep.* 164.)

11. Forging a deed within this state, for lands lying in the *Missouri Territory*, or in another state, is an offence indictable and punishable by the statutes of this state.

The prisoners were convicted at the *Rensselaer* Oyer and Terminer, for the forgery of a deed of land, described as situated in the *Territory* of *Missouri north.* They were brought before the Supreme Court, in *August*, 1820, with their records of conviction; and it was urged, on their behalf, that the statutes to prevent forgery, (1 R. L. 405.) and that declaring the punishment for certain crimes, (1 R. L. 408.) were passed for the protection of titles to lands in this state; and, by a natural and necessary implication, were confined in their operation to such lands. The statute 5 *Eliz.* c. 14., as to forging deeds, has been adjudged not to extend to forging a lease or deed of lands in *Ireland*, (1 *Hawk. ch.* 70. *sec.* 20. 2 *Hale's P. C.* 684. *East's C. L.* 921. 3. *Leon.* 170.)

The court decided that the offence was within the statutes of our state. The

decision from *Leonard*, the court could not recognize as authority. A complaint was made in the *Star chamber*, that a lease of lands in *Ireland* had been forged; and a reference was made to the two Chief Justices of the points of law in the case. They reported it as their opinion, that it was not a forgery within the statute of *Elizabeth*. No argument took place before them.

The essence of the crime consists in an intention to defraud a person; and it is immaterial where the lands lie. The prisoners could not be punished in *Missouri*: the *corpus delicti* is here, and here only can they be punished. The forging and uttering of bank paper in this state, issued in other states, have been punished here for a series of years, and without any doubt of our right to do so.

Hauy was sentenced to the State prison for fourteen years, and *Flanders* seven.

Hutchinson's case, (1 *Mass. Rep.* 6.)

12. The person whose name is alleged to have been forged, is not a competent witness to prove the forgery, unless the instrument be produced.

The prisoner was indicted for forging a *promissory note*, purporting to have been made by one *Samuel Castle*, payable to the prisoner or order; and on the trial, *Sullivan*, Attorney General, offered to prove by three witnesses that they had seen the note in the prisoner's hands; and by *Castle* that he never gave the note. The evidence was objected to; and by the court, (*Strong*, *Sedgwick*, *Sewall*, and *Thatcher*, Justices, present,) though there may be cases in which forgery may be proved without producing the instrument; yet, the person whose name is alleged to be forged is not a competent witness, unless it be produced. Though it is now (1804) settled in *England*, that the person whose name is forged is not a competent witness to prove the forgery, yet the practice has been, for a long time, different in *this state;* and that from a supposed necessity,—that is, from the impossibility, ordinarily, of proving the forgery without his testimony: but we have never known this done without producing the instrument. In departing from the *English* decisions, the court has gone far enough; and the principle ought not to be extended farther. (See *Howell's* case, 4 *Johns. Rep.* 296.)

Boynton's case, (2 *Mass. Rep.* 77.)

13. Uttering a bank bill, with the name of a fictitious cashier countersigned thereto, is not within the statute of *Massachusetts*, of *March* 6th, 1801, but is an offence at common law.

The prisoner being indicted under that act, for forging and uttering a $10 bill of the *New Hampshire* bank, (set forth in the indictment, as being *countersigned by the cashier* of the bank,) on the trial it appeared, and was so specially found by the jury, that the counterfeit bill was countersigned by *Peabody*, a fictitious person, and not the cashier. The act provides, in effect, that if any one shall utter and publish any bill or note of the similitude of any bill or note issued by any bank which now is or shall be established by the laws of that state, or either of the states, and signed by the President, and *countersigned by the cashier* thereof, &c. he shall be punished, &c.

After argument, (in *July*, 1806,) *Parsons*, Ch. J. held, that the offence, as found specially by the jury, was not within the act, but that it was a fraud at common law. And the court refused to arrest the judgment.

Cone's case, (2 *Mass. Rep.* 132.)

14. Possession, in the state of *Massachusetts*, of ten counterfeit bank bills, with an intent to pass them in *Connecticut*, is an offence within the act of the former state, 15th *March*, 1805.

This statute provides, in effect, that any person who shall possess, at any one time, any number not less than ten of counterfeit bills, with intent to utter or pass them, and thereby injure and defraud any body politic or corporate, or any person or persons, then, &c.;—and, the prisoner having been convicted on an indictment under this act, it appeared that he had possession, in *Massachusetts*, of ten counterfeit bills of the *Nantucket* Bank, and had appointed a place of meeting with another in *Connecticut*, for the purpose of delivering them to him, that they might be put into circulation there. He was convicted; and, in *September*, 1806, his counsel moved for a new trial, on the ground that the intent to pass the bills in *this state* ought to have appeared.

Sed non allocatur; et per Parsons, Ch. J.—It is immaterial *where* the priso-

ner intended to pass the bills. The *gist* of the criminal intent alleged, is to defraud the *Nantucket* bank, which would be as effectually defrauded by passing them in *Connecticut* as elsewhere.

Morse's cases, (2 *Mass. Rep.* 128.)

15. The possession of materials designed for counterfeiting bank notes, without an intent to use them in counterfeiting, is not an offence within the *Massachusetts* act of *March* 15, 1805.

16. It is not indictable to have in possession, with intent to pass, *papers*, purporting to be bills of a bank not in existence.

This act renders it felonious to have in possession materials for counterfeiting, *with intent to use and employ the same for that purpose;* and, after conviction under the act, for the possession of six quires of paper, on an indictment, in which such intent was not alleged, the prisoner's counsel, for that reason, moved in arrest of judgment; and, after argument, the court, in *September*, 1806, arrested the judgment.

N. B. During the same month, he was indicted at common law, for having in possession, with intent to utter, two forged *papers*, one of them purporting to be a bank note of *Richmond* Bank, for $ 5, and the other of the *Salem* Bank, for $ 6, well knowing that there *was no such bank* or *corporation* as was in the papers expressed; *contra pacem;* and, on demurrer to the indictment, the court held, that it was no offence, either at common law or under the act. It was only an intention to cheat, which was not indictable. (2 *Mass. Rep.* 138.)

Ross' case, (2 *Mass. Rep.* 373.)

17. An indictment for uttering a forged promissory note, need not set forth its date, nor the time when the money was payable.

The prisoner was convicted on an indictment for forging and *uttering* a promissory note of one *S. B.* for $ 500, *dated in September*, 1805; and the reason why it was not more particularly described was that, on his arrest, the prisoner swallowed it. His counsel moved in arrest of judgment, in *March*, 1807, on the ground that the note was not sufficiently described. It does not appear *when* it was dated, nor *when* payable.

To this it was answered by the Attorney General, that the second count was for *uttering;* and on that, the *uttering* and *publishing* is the gist of the offence. Of this opinion was the whole court; and the prisoner was sentenced on the *second count.*

Ward's case, (2 *Mass. Rep.* 397.)

18. An indictment for forging a promissory note, need not allege the indorsement of the note, though forged, as it is no part of the note.

Motion for a new trial, in *March*, 1807. The prisoner having been convicted for forging and uttering a promissory note, purporting to be that of *Jonathan Ellis*, payable to *John Flanders* or order; and because, on the production of the note on the trial, it appeared to have been indorsed by him, and this was not alleged, his counsel objected to the evidence. The objection being overruled, this formed the ground of this motion. The Chief Justice said, the indorsement was no part of the note, and the court denied the motion.

Snell's case, (3 *Mass. Rep.* 82.)

19. On a trial for passing a forged note, which has been secreted to protect the offender, the person whose name is alleged to have been forged, having seen and copied the note, is a competent witness to prove the forgery, and the note need not be produced.

Motion for a new trial, on a point reserved by the Chief Justice; after a conviction for uttering a forged note to *Clement Bunker*, purporting to have been subscribed by one *Raymond Smith*, was made and argued in *July*, 1807, and the facts were, that the prisoner passed the note to *Bunker*, who showed it to *Smith*. He took a copy of it, declaring it to be a forgery. *Bunker* took out a warrant against the prisoner, who absconded. *T. Snell*, the prisoner's brother, gave *Bunker* security for the note; and, by their contrivance, it was secreted, so that it could not be produced. On the trial, *Raymond Smith* was called to prove the note a forgery; and, though objected to, he was admitted by the Chief Justice, to prove that fact, without the production of the note. And, after argument, *per tot. cur.*—The conviction is right. *Smith* was a competent witness; and his testimony was properly admitted. This differs from *Hutchinson's* case, (1 *Mass. Rep.* 7.) *Castle* never saw the note; *Smith* did, and took a copy.

Kinison's case, (4 *Mass. Rep.* 646.)

20. Upon an indictment for having in possession a counterfeit bank note, it is not sufficient for witnesses to swear to its identity, unless it has been constantly in their possession, or they have put a private artificial mark upon it before parting with it.

The prisoner was convicted for having in his possession a *counterfeit note*, with intent to pass it; and the facts on the trial were, that the note was passed to *Daniel Pecker*, who, without putting any *mark* on it, delivered it to the Justice, *two or three weeks* before. *Pecker* swore positively to the identity of the note, on which there were three accidental marks, by which he identified it. The Justice might have been, but was not, produced as a witness. The point being reserved, the *motion* was for a new trial. In *November*, 1808, *Parsons*, Ch. J. delivered the opinion of the court, that the verdict must be set aside, and a new trial granted, on the ground, that evidence of an inferior nature, where higher exists, and may be had, shall not be admitted. The testimony of the Justice would have been direct, and is of a nature superior to that which was produced.

Brown's case, (8 *Mass. Rep.* 59.)

21. To an indictment upon the second section of the *Massachusetts* act of 1804, c. 120, for having in possession ten or more counterfeit bank bills, it is no sufficient objection, that it is alleged that such bills *purport* to be bills of such a bank—

22. That they were payable to the bearers thereof—that they are not alleged to be *similar* bills—

23. That they are described as promissory notes or bank bills—

24. Or, that it is not alleged that the party charged had knowledge of the false making, &c.

These points were decided, (after conviction,) upon a writ of error, in *September*, 1811. The case is voluminous, involving rather a consideration of the construction of the statute above referred to, than the general principles of criminal law.

Houghton's case, (8 *Mass. Rep.* 107.)

25. In an indictment on the statute of 1803. c. 120. for having in possession more than ten counterfeit bank bills, it is necessary to describe the bills in the indictment, or to set forth therein a sufficient reason why they are not so described.

A motion in arrest of judgment was made and argued in *September*, 1811, after conviction, on an indictment, under the act, for having in possession more than ten, to wit, twenty-five forged and counterfeited bank bills, or promissory notes, on the *Union* Bank, of $5 each, with an intent to pass them; but neither the tenor of the bills, nor their number nor date, were set forth; and after argument, the court unanimously held that the judgment must be arrested. (See *Brown's* case, 8 *Mass. Rep.* 59. 2 *Leach*, 696.)

Hayward's case, (10 *Mass. Rep.* 34.)

26. It is not an indictable offence to tear or cut a piece out of a bank note, with intent, with the bill thus altered, and with such piece, together with other pieces of similar bank notes, altered, cut, and torn out, to form other bank notes, with intent to utter the same, and thereby injure and defraud the company issuing such notes.

The prisoner was convicted on an indictment, under the *Massachusetts* act against counterfeiting, alleging, in substance, that he had in his possession a *Hallowell* and *Augusta* bank bill, and tore or cut out a piece thereof, and thereby altered it, with intent, with said bill, so altered, and with the piece so cut out, together with other pieces of similar bank bills, altered, torn, and cut out, to form other bank bills, with intent, &c. And in *March*, 1813, his counsel moved in arrest of judgment, principally on the ground that to cut or tear out a piece from a bank bill, belonging to the party, is no offence, either under the act, or at common law.

Per Cur. This is a non-descript offence, and is not within the provision of the law against altering bills, which means such an alteration as will increase the apparent value of the bill. Had he succeeded in making a bill of these pieces, perhaps it would have been forgery. The judgment must be arrested.

N. B. The mode adopted by the defendant was, to take several (say seven) of these bills, of the same denomination, and cut a strip, perpendicularly, from each bill, uniting the parts separated, and, with the several strips united, to form an eighth bill.

Sweer's case, (1 *Dall. Rep.* 41.)

27. During the revolutionary war, it was held indictable at common law for a deputy commissary general of military stores to alter, fraudulently, a bill of parcels of goods furnished to the army, and duly certified to have been received for the use of the *laboratory*.

The amount of this case was, that the defendant, a deputy commissary in the

United States army, had purchased goods for the army, of *Margaret Duncan*, and having a bill of parcels from her of the goods so furnished, duly certified to have been received by *Isaac Coran*, captain of artillery, so altered and added figures in the bill, as to make it amount to £451 17*s.* 5*d.*, while the true amount was £381 17*s.* 5*d.* For this he was indicted and convicted, in the *Philadelphia* Oyer and Terminer. The indictment was at common law, and charged the offence to have been committed with an intent to defraud the *United States*. He removed the case into the Supreme Court by *certiorari*, and in *April*, 1779, his counsel moved in arrest of judgment, principally on two grounds, the one, that at the time of the offence charged, the *United States* were not a body corporate known in law; the other, that the indictment does not charge that any person was defrauded.

Sed per M'Kean, C. J. The *United States*, since their association, is a body corporate; an indictment, however, may be maintained upon an intent "to deceive my liege subjects." In *Webb's* case, (2 *Ld. Raym.* 1461.) all the judges declared that if the cheat be prejudicial, an indictment would lie. In forgery, properly so called, as of records, deeds, wills, &c. perhaps it is necessary that some person should be prejudiced. This rule does not extend to cheats of this description; it is sufficient that the act be of a prejudicial nature.

Keating and *Ross's* cases, (1 *Dall. Rep.* 111.)

28. The person whose name is forged, is a competent witness to prove the forgery.

This point was decided in the *Philadelphia* Oyer and Terminer, in *October*, 1784, in the case of *Keating*, where the prisoner was indicted for forging a promissory note, payable to *John Meng*, and the question arose on the admissibility of his testimony to prove the forgery; and it was decided by *M'Kean*, C. J. that he was a competent witness. Subsequently, and in *December*, 1795, the same question arose, in the case of *Ross*, indicted for forging a promissory note, purporting to be drawn by *Joseph Heister*, and the same question being raised, and fully argued, the Supreme Court of *Pennsylvania* decided the point as in the preceding case. (See *Howell's* case, 4 *Johns. Rep.* 296.)

Levy v. *Bank of the United States*, (4 *Dall. Rep.* 234.)

29. If a bank receive and credit one with the amount of a check, which afterwards is found to be a forgery, but which came into his hands *bona fide*, the bank must lose the money.

Levy, having a cash account with the bank, sent a check there for $2,600, purporting to be drawn by *Charles Wharton*, in favour of *Joseph Thomas*, to whom *Levy* had paid the money. The bank promptly entered the amount in his cash book, as of a deposit of cash, and gave him credit. In the afternoon the bank found the check a forgery, cancelled the entry in his favour in the book, and sent a clerk to *Levy*, informing him of the forgery, demanding his check in lieu of that which was forged. He refused to comply; but the bank, having other money of his deposited there, withheld the amount of the check, and to recover this, the suit was brought. The cause underwent three several arguments: 1st, on the trial before the jury; 2d, on a motion for a new trial; and 3d, on a writ of error to the *High Court* of *Errors and Appeals* in *Pennsylvania*; and all the authorities on the subject were adduced on both sides. The plaintiff recovered, and the judgment was affirmed.

So, in the cause of *The United States* v. *The Bank of the United States*, tried in the Federal Circuit Court, in *October*, 1800, before *Paterson* and *Peters*, Justices, it was held, that if a man accepts a forged bill or draft, he is not only conscientiously, but legally, bound to pay it.

White's case, (4 *Binn. Rep.* 418.)

30. It was held an indictable offence, under the *Pennsylvania* act, *April* 22, 1794, against counterfeiting a bank note of the *United States*, to pass a counterfeit note of that bank, though its corporate powers had ceased.

Error to the Quarter Sessions of *Chester*, *Pennsylvania*, from the Supreme Court: The prisoner was indicted and convicted at the Quarter Sessions, in *January*, 1812, (and after the expiration of the corporate powers of the *then* late bank of the *United States* had expired, but while the trustees in whom the stock was vested was bound

to pay the notes before issued,) for passing a $20 counterfeit note on that bank knowingly; and the principal question presented to the court was, whether the conviction could be sustained under the act of that state of the 22d of *April*, 1794, rendering it penal to pass a counterfeit note of the Bank of the *United States*, knowing it to be such.

In *March*, 1812, the point was argued; and the court decided that the offence was within the words of the act—certainly within its spirit. Though the corporation was not in existence, yet the genuine notes were. The trustees were bound to pay them; and the court, therefore, held that counterfeiting any genuine note issued while the corporate powers of the bank existed, was indictable and punishable under the act of 1794.

Judgment affirmed.

Searl's case, (2 *Binn. Rep.* 332.)

31. Uttering a forged note of hand, *not under seal*, knowingly, is indictable at common law, and punishable under the acts of *Pennsylvania*.
32. Where a statute *creates*, or *expressly prohibits* an offence, and prescribes a punishment, the statute punishment cannot be inflicted, unless the indictment concludes *contra formam statuti*; otherwise, where the statute only inflicts a punishment on that which was an offence before.
33. It is unnecessary to set forth the ornamental parts of a bill, as the devices, mottos, &c. in an indictment for counterfeiting bank bills.

The prisoner was convicted at the *Philadelphia* Oyer and Terminer, in *December*, 1809, on an indictment for forging and uttering a bank bill of $10 on the Bank of *North America*. The indictment was in the usual form, but concluded *contra pacem*, and not *contra formam statuti*; and in the description of the bill, in the indictment the words "ten" and "*cavendo tutus*," in the margin, designed as ornaments, were omitted. In *March* following his counsel moved in arrest of judgment principally on the following grounds:

(1.) The offence is not indictable at common law: it is created by act. But if it is an offence at common law, still, as as it is punishable by the act only, in this case, no punishment can be inflicted, because the indictment does not conclude against the form of the act.

(2.) There is a variance: the note produced has the words "*ten*" and "*cavendo tutus*" in the margin; but in that set forth in the indictment, those words are omitted.

After argument, Chief Justice *Tilghman* pronounced the opinion of the court against the objections; deciding, on the first point, that to forge or utter an instrument of this description, though not under seal, was an offence at common law; and that the prisoner was punishable under their acts; and with regard to the second objection, the court concurred with the decisions in two cases in the *Massachusetts* Reports. (*Mass. Rep.* 62. 2 *Ib.* 203.) See also 3 *Johns. Cases*, 299. where this point is expressly decided.

David Gustin's case, (2 *Southard's Rep.* 744.)

34. An indictment for forgery must set out the tenor of the instrument forged.

On *certiorari* to the *Essex* Oyer and Terminer from the Supreme Court of *New-Jersey*, in *February*, 1820: The indictment charged the prisoner with forgery; for that *David Gustin* and *Daniel Harker*, on, &c. at, &c. made a joint promissory note, payable ninety days after date at the *New-Brunswick* Bank, to *John Gustin* or order, for $500, which was indorsed by *John Gustin* and *John Ogden*, and delivered to *David Gustin* to be discounted; and that he altered it from $500 to $5000, &c. *contra formam statuti*.

It was objected, on a motion to quash the indictment, that the tenor of the note was not set forth, nor any fact showing that it could not be done. The objection was sustained by the court, and the indictment was quashed. Afterwards a new indictment was framed, in which the tenor of the note was set forth. (*ib.* 749.)

35. Committed in the alteration of bank bills, i. 1. 133. 145
36. That the prisoner passed other spurious bills, not laid in the indictment, may be proved to establish the *scienter*, i. 46. 49
37. Heretofore committed by the prisoner's companion, not good evidence, unless a connection is shown between them, i. 81.
38. Guilt inferred from circumstances, enumerated, i. 1, 2. 47. 109, 110. 130. ii. 47. 87

39. Effected by ingeniously altering bank bills from a less to a greater denomination, i. 132, 133
40. Of an order for the delivery of goods, i. 116. 141
41. Two persons, jointly indicted under the first and ninth sections of the act to prevent forgery and counterfeiting, are not entitled to a separate trial, i. 144. 177
42. But the court, for special reasons shown, will order a separate trial, *as a matter of favour*, ii. 177
43. The wife of one of the prisoners, being a material witness for the other, is a good ground of a motion for a separate trial, *ib.*
44. In selling counterfeit money as false, by the wholesale, how considered under the statute, i. 109
45. Substance of the statute extracted, *ib.* n.
46. The greater resemblance there is between counterfeit and true bills, the greater the crime of counterfeiting and passing them, i. 110
47. To pass a false and forged check, payable in notes current at the several banks in the city of *New-York*, is not a forgery at common law, or within the statute against forgery and counterfeiting, ii. 46
48. The forgery of an order for the delivery of goods, against a person who, by reason of a legal disability, would not have been liable on such order, had it in truth been genuine, is within the statute, ii. 54
49. A man who is engaged with others in passing counterfeit money, though arrested by an artifice, is not, therefore, the less guilty, ii. 56
50. Of a bond on the Earl of Chesterfield, ii. 72. n.
51. To have a counterfeit bill in possession, professedly with an intention of selling it as counterfeit, is contrary to the express provisions of the statute. (1 *N. R. L.* 406. s. 9.) ii. 84
52. In such case the intention is, *to permit, cause*, or *procure* such bill to be uttered and passed. (Vide vol. 1, p. 109.) *ib.*
53. An instrument in writing, directing or requesting the payment of a specific sum, in the *bills of an individual*, is neither an order for the payment of money nor delivery of goods, within the statute, (1 *R. L.* 405. s. 1.) ii. 155
54. Such bills not the subject of forgery, under the statute, *ib.*
55. One authorized by the corporation to issue small bills, issued them commencing with, "The corporation of *New-York* promise," &c.—and signed them with his own name. Held, that they were not notes for the payment of money within the act, iii. 59
56. It seems, that an instrument, to fall within that statute, must be such that an action might be sustained thereon without recurring to extrinsic testimony, *ib.*
57. The instrument upon which an indictment for forgery is predicated, if created by statute, must be conformable to its provisions, iii. 65
58. Statute relative to the forgery of a certificate of proof of a deed, *extracted*, iii. 69
59. Under the statute, established, though the *name* alleged to be forged is that of one not in existence, iii. 142
60. At common law, maintained, though the *name* forged should not be spelled right, *ib.*
61. On the traverse of an indictment at common law, for the forgery of an instrument, the public prosecutor will be allowed to recur to extrinsic evidence, to explain and show the meaning and intent of such instrument, *ib.*
62. In a case of forgery, it is not necessary that the witness, who is produced to prove the handwriting of another, should have seen him write. It is sufficient if he swear he has corresponded, by writing, with the party, and believes it to be his handwriting—or, if the witness be an officer of a bank, and swear that he had often seen his bank book, and was in the habit of receiving his checks, and paying them, in the ordinary course of business, this is equivalent to the evidence of handwriting by means of foreign correspondence, iv. 52
63. The public prosecutor must produce the bills, laid in the indictment, on the trial, or identify them with sufficient certainty, iv. 62
64. On a bank at a distance from *New-York*, the existence of the bank and the

forgery may be proved, without producing the charter of incorporation, or the officers of the bank, iv. 107

65. A paper, purporting to be a power of attorney, authorizing the receipt of a pension, due from the government to a wounded seaman, not under seal, though forged, is not an instrument upon which an indictment for forgery under the statute can be predicated, iv. 163

66. An indictment for *feloniously* forging an instrument, which is not the subject of a forgery under the statute, cannot be sustained at common law, *ib.*

67. During the trial, a felony cannot be modified into a misdemeanor, *ib.*

68. Committed, though the prisoner came by the bill *bona fide*, if he afterwards had *reasonable grounds* for believing it bad, v. 1

69. It is not necessary, in such cases, for the public prosecutor to show that the prisoner knew, to an absolute certainty, that the bill so passed was counterfeit, *ib.*

70. The result of a suit, in which the genuineness of a bill was involved, and the decision against it held a *reasonable ground* for believing it bad, *ib.*

71. Not committed by leaving a bill, supposed to be bad, with another for examination, *ib.*

72. The mere fact of passing a single counterfeit bill, not accompanied with circumstances, from which a deduction can be fairly drawn, that the prisoner knew it to be bad, is insufficient to produce a conviction, v. 74

73. Where a prisoner is tried the second time for passing counterfeit money, the particular circumstances, upon which the former prosecution was founded, may be given in evidence, *ib.*

74. Not much stress laid on the circumstances of the former passing, if he were acquitted; and the former examination is not admissible, *ib.*

75. To constitute forgery, it is not necessary that the name of any person in existence should be forged, v. 87. vi. 25

76. Where the prisoner, on passing false paper, alleges it to be that of a particular person in a particular street in a city, if, on the trial, it appears that such a person resides in that street, some evidence should be produced by the public prosecutor, to show the signature not to be that of such person; but if no such person resides there, some evidence should be produced of the fact. v. 87

77. To constitute the possession of counterfeit money, it need not be found on the person; it is sufficient if it be under the control of the prisoner; and this may be inferred from the circumstances, v. 115

78. A bill on a particular bank, alleged to be counterfeit, cannot be proved to be so by a witness who testifies merely from its general appearance, without knowing even the names of the president and cashier of the bank, v. 176

79. A bill, alleged to be counterfeit, was set forth as a bill on a particular bank; but, on the face of the bill, a joint promise was set forth, commencing with the words, "We promise to pay," &c. to A. B. "at the bank," &c., and purporting to be signed by persons, as president and cashier, who were not, in fact, the officers of that bank; and, for aught that appeared, were fictitious persons; it was held, that in such a shape the prosecution could not be maintained, *ib.*

80. Where a quantity of counterfeit bills are found in the possession of a man at the same time, he cannot be subjected to more than one prosecution for counterfeiting, passing, and having them in possession with intent to pass them, as this is but one offence, v. 179

81. A note of the *Montreal* Bank, which contains a promise to pay A. B. or bearer $20, "out of the joint funds of the association," is the subject of an indictment, under the first and ninth sections of "an act to prevent forgery and counterfeiting," (1 *R. L.* 404.) vi. 18

82. So is a bank bill for the payment of a specific sum to A. or bearer, "*out* of the joint funds thereof, according to the articles of the association," vi. 23

83. Committed, by forging the name of *John Wardell*, though an N. was written between; as the letter forms no part of the name, vi. 25

84. Though the forged instrument first comes into the hands of the prisoner out of the jurisdiction of the court, yet

his subsequent possession of it within the jurisdiction, and his declaring it good, is a sufficient passing, vi. 25

85. To write an instrument, fraudulently, over the signature of another, which, if true, would be to his prejudice, without his knowledge, is a forgery, vi. 27

86. Where a counterfeiter, for the purpose of entrapping one, put counterfeit bills in her possession, such counterfeiter, on a trial for passing them, shall be presumed to have had possession of the bills, *at a time anterior*, with intent to pass them, vi. 51

87. To constitute forgery, it is not essential that the handwriting should resemble his whose name is forged, vi. 61

88. The person whose name, to an order for the delivery of goods, is forged, should have a right to order their delivery; for it seems, a mere request in writing, to deliver an article, over which the drawer has no control, is not an order for the delivery of goods, and to make such instrument falsely, is not forgery, *ib.*

89. There should be a direction of the name of the person to whom an order for the delivery of goods is sent, and the article ordered should be described with certainty, *ib.*

90. Before the District Attorney can produce evidence that a prisoner, charged with uttering, and having in his possession with an intention of uttering, a particular bill, had in his possession, and uttered counterfeit bills not laid in the indictment, it is incumbent on him to show, that the prisoner actually passed, or had in his possession, the bill laid in the indictment, vi. 86

91. Proof of the *scienter* is not admissible before the principal charge is established, *ib.*

92. An indictment, in the first count, charged the prisoner, substantially, with having forged and altered a bill of exchange, bearing date at *Montreal*, (*Lower Canada*,) with intent to defraud the president, directors and company of the *Montreal* Bank, S. G., R. G., and other persons to the jurors unknown. In another count, he was charged with having passed the same bill, with intent to defraud the same bank, by its appropriate name, as above, S. G., R. G., N. P., S. W., and J. S., and other persons to the jurors unknown; and, in another count, he was charged with having passed the same bill, with intent to defraud P. W. and S., (a firm,) and N. P., S. W., and J. S.; and the forgery, alteration, and passing, were alleged in the indictment to have taken place in the city of *New-York*. It was held—1. that if the jury believed the bill to have been altered in *Canada*, they ought to acquit the prisoner of the *forgery* and *alteration*.—2. If they believed he passed the bill in *New-York*, they ought to convict him for *passing it*.—And, 3. that there was *sufficient certainty* in the indictment, relative to those whom he intended to defraud, vi. 107

93. Under the act, cannot be committed unless the note is payable in money, i. 159. ii. 155

See Aiding, Abetting and Assisting, 3. Autrefois Acquit, 4. Evidence, 10. 42, 43. Jury, 15. Misdemeanor, 10. Possession, 6. 9. Scienter. Slander, 6. Variance. Witness, 12.

Fraud.

Babcock's case, (7 *Johns. Rep.* 201.)

1. To constitute a *cheat* or *fraud* at *common law*, it must be such a fraud as would affect the public—such a deception as common prudence cannot guard against; as, by using false weights or measures, or false tokens; or where there is a conspiracy to cheat: otherwise, it is not an indictable offence.

2. A. had a judgment against B., who came to him and said he would settle it, by paying the money in part, and giving a note for the residue. A. then drew a receipt in full in discharge of the judgment, and B. got possession of it, without paying the money or giving the note. The indictment charged B. with having obtained the receipt falsely, fraudulently, and deceitfully, and under false acts, colours and pretences; and under pretence, that he had the money in his pocket, and would pay it immediately, and give his note for the residue; it was held, that there was no false *token*, but only a false assertion, and that an indictment would not lie.

The defendant having been convicted at the *Oneida* Oyer and Terminer, under an indictment *at common law*, for cheating, the facts in which, and as they appeared in evidence, being such as are above stated; his counsel, in *November*, 1810, moved in arrest of judgment, in the Su-

preme court, on the ground that this was not an indictable offence *at common law.*

The case was amply discussed; and all the leading authorities cited. In the decision of the court, *Wheatly's* case, 2 *Burr.* 1125. *Jones'* case, 1 *Salk.* 379. and *Lara's* case, 3 *Term Rep.* 565. were mentioned as authorities supporting the position, that in an indictment for cheating at *common law*, it must be such a fraud as *would affect the public;* such a deception as common prudence could not guard against, as using false weights or measures, or false tokens, or where there was a conspiracy to cheat; and that as there was no false token used in this case, the judgment must be arrested. (See *Conger's* case, 4 *City-Hall Rec.* p. 65. and the points collected at the end of that case.)

Miller's case, (14 *Johns. Rep.* 371.)

3. The special sessions has no jurisdiction of *cheats.*
4. In a record of conviction before them, the *place* where the offence was committed must be stated.
5. Where one got possession of a note, by pretending that he wished to look at it, and carried it away, refusing to deliver it to the holder; it was held, that it was a mere private fraud, and not punishable criminally.

In error on *certiorari*, to a special sessions of *Otsego: George Wilson* complained that the defendant had been guilty of a misdemeanor, in taking away a note. The court was formed, &c. and it appeared that the defendant called on *Wilson*, and wished to see the note given by him to one *Marsh*, or bearer, for ten tons of hay. It was handed him, to look at, when he mounted his horse and rode away. The sessions convicted him, and he was fined $12 50.

On an objection taken to the conviction, the Supreme Court, in *October*, 1817, decided, 1. That a special sessions has no jurisdiction over offences of this kind.—2. That in the record of conviction, the place where the offence was committed should be stated, that it may appear whether it was within the jurisdiction of the court, and, 3. That this was not a criminal offence: it was a mere private fraud. (7 *Johns. Rep.* 204. 6 *Term Rep.* 565.) Conviction reversed.

Johnson's case, (12 *Johns. Rep.* 292.)

6. To obtain goods under the pretence that the prisoner lives with another who sent him for them, is an offence under the act.

Case from the *New-York* sessions: The indictment charged that the prisoner pretended to one N., that he lived with, and was employed by one T., and that T. had sent him to N. for one pair of shoes: by which false pretence, the prisoner obtained the shoes; whereas he did not live with T. &c.—contrary to the act, &c.

The Supreme Court, in *August*, 1815, referring to the case of *Babcock*, (7 *Johns. Rep.* 201.) to 3 *Term Rep.* 98, and to 2 *East's C. L.* 830, decided that the case was within the act, and that judgment ought to be pronounced upon the prisoner, in the court below.

Hearsy's case, (1 *Mass. Rep.* 137.)

7. The court will arrest a judgment after the prisoner has pleaded guilty, if the indictment does not set forth an indictable offence.

The indictment set forth that the defendant and one *Nathaniel Cushing*, delivered into the hands of one *Jacob Dyer*, Jr. a deed of bargain and sale, executed by one *Jacob Harding* to *Cushing* for sixteen acres of land, of which the defendant had purchased a part: that the deed was to be safely kept by *Dyer*, until the 1st day of *June* then instant; and if on that day the defendant should pay *Cushing* $500, with interest, &c., then *Dyer* should deliver the deed to the defendant, as was agreed between *Cushing* and the defendant; but that the defendant, without paying the money, and without the knowledge of *Cushing*, intending to defraud *Cushing*, &c. under false pretences, &c. did *take* and carry away the said deed, &c. *contra pacem.*

The defendant pleaded guilty; but the Judges of the Supreme Court, in *October*, 1804, on looking into the indictment, said, that there was no crime therein charged, and directed the clerk to make an entry that the judgment was arrested.

8. The right of property must be devested, i. 7
9. Must consist in such a pretence as ordinary prudence cannot guard against, *ib.*
10. Rather than force, essential, i. 60
11. Maintained where A. falsely pretended to B. that he had a bill of exchange ready to be delivered and thereby obtained money, i. 83
12. Maintained where one deprived another of a bill of lading, in which he had but an *equitable right*, i. 89

13. Inferred from circumstances, i. 89
14. All the false pretences laid need not be proved, *ib.*
15. Substance of act extracted, *ib.* n.
16. Approximating to, and conjoined with felony, i. 116. ii. 54. 157
17. Perpetrated, by prisoner falsely representing himself what he was not, i. 116
18. Not made out from prisoner's drawing checks on banks when he had no funds there, i. 138
19. Not established from an assertion grounded on his bare responsibility, *ib.*
20. Full reliance must be placed on the pretence, and delivery of goods must be consummated, i. 7. 140
21. Not predicated on a false promise, i. 164
22. Perpetrated by obtaining $50,000 on forged bills of exchange, i. 156, n.
23. Perpetrated by the prisoner's taking advantage of the private dealings of two individuals, whereon he founded a plausible story, which he related to one of them, whereby he obtained the money, iii. 3
24. Indictment alleged that *money* was obtained; the proof was, that a $10 *bill* was—held bad, *ib.*
25. Bank bill, *legally*, is not *money*, *ib.*
26. Indictment alleged, that the prisoner delivered the prosecutor a pocket-book to keep, pretending there were $25 in it, and requested a loan of $10; and, believing it true, the prosecutor lent him the money: the proof was that the prisoner first counted out from the pocket-book $100, in bills; and, by sleight of hand, slipped them into his sleeve, the prosecutor believing them to have been returned—held, 1. that the indictment was bad; 2. that it was not supported, *ib.*
27. May be perpetrated by such an artifice; but it should be correctly laid, *ib.*
28. Not maintained against one who, having dealt with a bank, punctually, several years, had been in the habit, when he deposited money and wished to draw, to pass from the desk of the receiving to that of the paying teller, and exhibit his book, to show his account good; and on this occasion, (this being the *gravamen*,) having deposited but $1,209, passed as usual with his book and own check for $5,450, and drew the money, but did not say his account was good, iii. 118
29. An allegation, *by speech*, necessary, *ib.*
30. *Quere:* Are a man's own notes, in his own possession, *effects* within the act? *ib.*
31. Perpetrated by falsely representing to the wife, that her husband had directed the gun to be delivered for repair, and thereby obtaining it, iii. 155
32. Perpetrated by the pretence of country customers sending the prisoner orders, iv. 33
33. Perpetrated by pretending he lived in a street where opulent men dwelt, *ib.*
34. Proof and indictment must square iv. 52
35. Pretence must be the *sole inducement*, iv. 61. 65. 143
36. Bill of parcels, in the indictment, must not be set forth abbreviated, iv. 65
37. Pretence, if made *after the delivery*, the case fails, iv. 143. 156
38. Must be predicated on some matter *then* in being, iv. 65
39. Indictment should contain a full denial of the truth of the pretence, *ib.*
40. Pretence should be named such; not a *representation*, *ib.*
41. That the prosecutor trusted to defendant's *promises* and *assurances*—bad in an indictment, *ib.*
42. The indictment should state that the false pretence was the inducement to the delivery, *ib.*
43. Here note, that in the 4th volume of this work, p. 73, 74, 75, all the points on the subject of fraud, appearing in the previous parts of the work, are collected; which see.
44. Indictment alleged the pretence to be, that a certain mortgage was good security—held, that it must be proved worthless, iv. 75
45. Sufficient to set forth the *substance* of a deed, *ib.*
46. Whether the false pretences charged in the indictment were of a nature calculated to deceive the party, and induce him to part with his property, is a question of fact for the jury, iv. 143
47. Though a civil suit might not lie on the false representation, a criminal prosecution will, *ib.*

48. Maintained sufficiently to cast the burthen of proof on prisoner, by slight proof touching the *negations*, iv. 143
49. Not maintained where one merely changed his own check for the money, having no funds in the bank, iv. 156
50. Though the false pretence charged, must be the sole inducement to the parting with the goods, yet every accidental circumstance which, in conjunction with the false pretence, influenced the delivery, need not be alleged, v. 5
51. Where one by a false pretence, obtained property, in which he succeeded with the greater facility by reason of his being recognized by the prosecutor as having been in his store before, it was held that this was but a circumstance incidental to the delivery, and not such an inducement as required notice, *ib.*
52. W., the owner of goods, on going to a foreign port, left them in charge of T. a clerk, from whom they were obtained by false pretences, and the indictment alleged that the prisoner so obtained them, with an intent to defraud T. It was held that the indictment, in that respect, might be maintained, v. 74
53. For a man falsely to pretend that he is the captain of a vessel from a foreign port, just arrived; and, by that means, to obtain goods, is a false pretence within the act, v. 180
54. Where an indictment at common law alleged a fraud of a private nature, committed by an attorney, though not in that capacity, it was held that the indictment could not be maintained, v. 79
55. An indictment stated in effect, that an attorney advised his client to confess a judgment, to save his property from other claims; and after such judgment had been confessed by the client, in favour of such attorney and others, and entered up by him, that he caused the property to be sold on the execution, and bid off for his own benefit, at an inadequate sum; and that he kept the property and converted it to his own use. It was held that such charge was insufficient to support a criminal prosecution, and that the act constituting the *gravamen* of the charge, was not done by the attorney, in his official capacity, *ib.*
56. Statute of frauds, extract from, iii. 72. n.
57. How far a promise to pay the debt of a third person is within the act, iii. 71
58. What acts take a parol contract, for the purchase of lands, out of the statute, in equity, iii. 156

IN SELLING BY FALSE WEIGHTS AND MEASURES.

Powel's case, (1 *Dall. Rep.* 47.)

59. An indictment lies against a public officer for a cheat, in marking barrels of bread as of the weight of 88lb. each, when, in fact, they only weighed 68lb.

On *certiorari* from the Sessions: The defendant, a baker, employed by the army, was convicted on an indictment for cheating, at common law, in marking 219 barrels of bread as weighing 88lb. each, whereas, they each weighed only 68lb. It was urged that this was not indictable.

Sed per cur.: (in *April*, 1780.) This is clearly an injury to the public; and the fraud is the more easily perpetrated, since it was the custom to take the barrels of bread at the marked weight, without weighing them again. The public could not by common prudence prevent the fraud, as the defendant was himself the officer of the public *pro hac vice*.

60. In a prosecution for selling by false weights and measures, it is incumbent on the prosecutor to show that the articles sold by the defendant, alleged to be short of weight or measure, were weighed or measured by the *standard weight or measure*, iv. 176

See INSURANCE, 2. LARCENY, 55. LIBEL, 30, 31. MISDEMEANOR, 7. SCIENTER, 11.

Gambling.

1. Permitted in a public inn, renders it a nuisance, i. 66
2. At the faro table described, *ib.*
3. Gamblers, in the eye of the law, persons of ill fame, *ib.*
4. Cock-fighting, i. 67
5. Match described, i. 68
6. Sentence of court against gamblers and cock-fighters, i. 69
7. In a grocery—the keeper indictable, ii. 53
8. A grocery licensed in the city of *New-*

York is an inn, or tavern, and to keep a shuffle-board, and permit persons to play in such grocery, is "an offence against the people of this state by statute." (1 Vol. *N. R. L.* p. 178. s. 8.) ii. 53

9. To keep instruments of gambling in a house, and permit persons to play for small sums, merely sufficient to pay for the use of such instruments, or for drink, is indictable, being more pernicious than gambling on a high scale, v. 136

10. Its evil effects shown, vi. 87

Gaol.

Tompkins' case, (9 *Johns. Rep.* 70.)

1. Lying in wait near a gaol, by agreement with a prisoner, and carrying him away, is not an offence against the act, (1 *R. L.* 411. sec. 19.) but a misdemeanor at common law.

The defendant was indicted, under the act, in the *Cayuga* Sessions, for contriving and conspiring with *Abigail Tompkins*, and for lying in wait near the gaol, that she might escape; and that pursuant to the conspiracy, she did escape; and so, the defendant did convey her away, and assist her in escaping.

In *January*, 1812, the Supreme Court decided, that the *gist* of the offence here charged, is *lying in wait* near the gaol; but that the act contemplated assistance to be rendered to the prisoner, while in gaol, to escape; and, on this ground, it was decided that the offence charged in this indictment was not within the statute.

Rose's case, (12 *Johns. Rep.* 339.)

2. One confined in gaol, who attempts to escape, by breaking prison, in consequence of which one confined for felony escapes, is guilty of an offence within the 20th section of the act, (1 *R. L.* 412.)

On *habeas corpus*. The prisoner was indicted at the *Onondaga* Oyer and Terminer, under the 20th section of the act, (above,) for aiding a prisoner, confined in the county gaol, to escape.

Rose, who was confined for some petty offence, in attempting to escape, by breaking gaol, enabled a fellow prisoner to escape.

By the Court, (in *August*, 1815.) This case is clearly within the mischief which the statute was made to prevent. Sentence, state prison for five years.

Washburn's case, (10 *Johns. Rep.* 160.)

3. It is not indictable, under the act, (1 *R. L.* 411. sect. 19.) to aid and assist one to escape from gaol, committed "*on suspicion* of having been accessory to breaking a house, with intent to commit a felony;" as this is not a distinct and certain charge of felony.

In error, from *Clinton* Sessions. The defendant was indicted, under the act, for aiding to escape from prison *Peter Mandeville*, committed "on suspicion of having been accessory to the breaking a house in *Plattsburgh*, with intent to commit a felony."

After argument, the Supreme Court, in *May*, 1813, decided, that as there was no distinct and certain charge of felony in the commitment, the defendant was not indictable and punishable under the statute. Judgment reversed.

See Arson, 1, 2. 12, 13.

Habeas Corpus.

1. Is the proper remedy, in case of illegal detention or imprisonment, i. 85
2. Will not lie from the Court of Sessions, in the city of *New-York*, to the police, *ib.*
3. A prisoner, confined under the vagrant act, will not be discharged by the chancellor on being brought before him, upon this writ, i. 153
4. Where a reasonable time had elapsed, after the commitment of a prisoner, as a fugitive from justice from another state, for the executive of such state to have demanded him, according to the constitution of the *United States*, and no demand appeared to have been made, he was discharged by the chancellor, being brought up by *habeas corpus*, *ib.*
5. The *writ* of *habeas corpus*, instead of the copy, should be served on the party who is required to make the return, iv. 47
6. The magistrate who issues a *habeas corpus* to bring before him a person detained as a slave, is bound to decide on the validity of the return to such writ, though such magistrate may be the president of a manumission society, the members of which have interposed to prevent such detention, *ib.*

7. The certificate of a magistrate, under a statute of the *United States*, before whom a person has been brought, who has been arrested as a fugitive from labour, from a state or territory, under the laws of which such person, as is alleged by the claimant, owes service or labour to the person claiming him or her, is but *prima facie* evidence that the person so claimed owes such labour and service; and, notwithstanding such certificate, the magistrate before whom such person, so claimed, may be afterwards brought on a *habeas corpus*, issued in pursuance of the recently amended *habeas corpus* act, (4th vol. *L. N. Y.* p. 293.) is authorized to examine into the facts contained in the return to such writ, and into the cause of such confinement and restraint, and thereupon either discharge, or bail, or remand the party so brought, as the case shall require, iv. 47
8. Statute relative to *habeas corpus* extracted, iv. 48

See INFANT, 1, 2. KIDNAPPING.

Homicide.

EXCUSABLE.

1. In a sudden affray and violent struggle between V. and S., on the ground, the former being stouter than the other, and rather the aggressor, both rose; and as the examination of S. in the police stated, (being the only evidence on the point of casting the stone,) "after S. cleared himself he picked up a stone, and told V. that if he did not let him alone, he would hurt him. V. came at S. again, and he then threw the stone and knocked him down." The skull of V. was fractured, and he died; held excusable homicide, ii. 164
2. Where in such case it is proved by a skilful surgeon, that after the accident, he performed the operation of trepanning on V., who had every rational prospect of recovering, but that in divers fits of delirium he tore open his wounds, by which death was induced, *but that such delirium was the result of such blow on the head*, it was held, that it was well laid in the indictment, and proved that *the death was occasioned by such blow*, *ib.*

FELONIOUS.

See MANSLAUGHTER. MURDER.

Indictment.

1. Where bank bills, alleged to be stolen, are particularly specified in an indictment, as they must be, it is incumbent on the public prosecutor to show that some or one of them, thus specified, was stolen, iv. 32
2. A count, in an indictment for stealing a promissory note, is nugatory, unless it conclude *against the form of the statute*, iv. 132
3. Though a judge at *nisi prius* may not undertake to quash an indictment sent down by the Supreme Court, to be tried before him, yet he will refuse to hear evidence affecting the moral character of an individual, on a particular count, which does not contain a criminal offence, v. 79
4. *Quere.* Whether, on a motion in arrest of judgment, an indictment for grand larceny against three persons, containing a count against a fourth, for receiving the same goods, mentioned in the counts for grand larceny, knowing them to have been stolen, is good after verdict against the three, the fourth not having been tried, v. 89
5. The time stated in an indictment is not material, nor traversable; but if an impossible day be laid, it will be a fatal defect, v. 103
6. It is an indictable offence, under the act of congress, of 1818, to fit, equip, load, or otherwise prepare any ship or vessel, in the *United States*, for the purpose of procuring slaves from any foreign place, to be transported to any other place, v. 122
7. Where a statute gives a public remedy, by imprisonment, for any public offence, but is silent as to the mode of proceeding to effect that remedy, it shall be intended that an indictment will lie, *ib.*
8. Where the place from which the slaves were to be procured, and where transported, is *known*, the indictment is bad, which alleges that such place was *unknown*, *ib.*

See ASSAULT AND BATTERY, 30. AUTREFOIS ACQUIT. BIGAMY, 13. BURG-

LARY, 7. 11, 12. 14. 19, 20. CHALLENGE TO FIGHT, 2. COINING, 3, 4. CONSPIRACY, 6, 7. 22, 23. 31, 32, 33. DESCRIPTION OF PROPERTY. EXTORTION. FORGERY AND COUNTERFEITING, 3. 17, 18. 21. 34. FRAUD, 7. 24. 26. 28. 34. 39. 44, 45. 54, 55. HOMICIDE, 2. INSURANCE, 8, 9. 11. JURY, 4. 12. 34. LARCENY, 11, 12. 35. MALICIOUS PROSECUTION, 1. MISDEMEANOR, 1. 6. 9, 10. 12, 13, 14. 17. MURDER, 1. 6. NEW TRIAL, 11. NUISANCE, 1. 20. OWNERSHIP. PERJURY, 14. 19. ROBBERY, 1. VARIANCE.

Infant.

Addicks et ux. case, (5 *Binn.* 520. 2 *Serj.* and *Rawle*, 174.)

1. The mother has the right of custody of female children, if she treats them well, though she lives separate from her lawful husband with another man.
2. But when one of them, no longer requires the mother's care, and the father wishes to place them in a suitable place, the court adjudged their custody to him.

On *habeas corpus* from the Supreme Court of *Pennsylvania: Joseph Lee*, in *July*, 1813, by this writ, brought up two infants, females, from the custody of the defendants; and his counsel moved the court to have the children delivered to his keeping, under the following circumstances: *Lee*, according to the laws of that state, had, in *June*, 1813, obtained a divorce *a vinculo*, from *Barbara*, his wife, on the ground that about the beginning of that year, she had a child by *Addicks*, and had since constantly lived with him; and had recently married him contrary to the act, (19th *September*, 1785.) *Lee's* counsel contended, that the father, being their natural guardian, had a right to the custody of his children; and that it was highly improper to permit them to remain under their mother's care. On the other hand, it was argued, and stated by her counsel, that there was no illegal restraint on them: that previous to the intercourse between the defendants, *Lee* had made no provision for the mother and them; that she treated them well; and that in no respect had that intercourse interfered with the attention due the children, whose sex and age required a mother's care.

The court decided, that though bound to free the children from illegal restraint, they were not bound to decide who was entitled to their guardianship, or to deliver them to the custody of any particular person; but that they might do so in their discretion, (2 *Stra.* 982. 3 *Burr.* 1436.) The mother's conduct is blameable; but the children appear to have been well taken care of: from their age, they stand in need of a mother's care; and on *their* account, they were not taken from her. But the father is not to be prevented seeing them; if he does not wish to go there to see them, she ought to send them to him when he desires it.—See the case of *Wright* v. *Wright*, (2 *Mass. Rep.* 109,) where it was decided that the mother of a bastard child is entitled to its custody, and shall hold it against the putative father, after a marriage and divorce had.

Afterwards, and in *January*, 1816, the same children, by *habeas corpus*, were brought before the court; and on behalf of the father, *Joseph Lee*, a motion was made that they be delivered over to his custody; and it was now urged, in addition to what was said by his counsel on the former motion, that as *Adelaide* was now thirteen years old, she no longer required the care of her mother; and their morals must necessarily be injured by residing with her. And further, that the father was able to maintain them, and was willing to place them under the care of the mother or brother of Mrs. *Lee*, in *New-York*, where he resided himself.

Et per Tilghman, Ch. J. These children do not stand before us as formerly. The eldest has now arrived at a critical age; every moment is important; and the education of the next three years will probably be decisive of her fate. The case of the youngest is not so urgent; but it is of importance that they should not be separated. I wish not to wound the feelings of the mother by unnecessary censure; but the case being brought before the court, it is impossible to shut our eyes on the impropriety of her conduct. She was divorced from her former husband for a great crime; and whatever may be her opinion of her second marriage, we know it is void by the law of this state. Yet, I view her not as a vulgar prostitute. She may have been ignorant of the law which rendered her marriage void, and it has not been

suggested that she has been unfaithful to the man whom she now calls her husband. She is said to have received a good education in a convent in *Canada*, and having been married by her mother's command, at too early an age, to a man with whom she had no previous acquaintance, she discovered too late, that neither her years, her habits, her education, nor her disposition, accorded with those of her husband. Hence her guilt and her misfortune. She may be pitied but cannot be justified. * * *

What effect will the decision of this court have on the morals of these children, from whom the unfortunate history of their parents can be no longer concealed? If they are permitted to remain with their mother, will they not conclude that her conduct is approved? There is one circumstance which has great weight with me. I am satisfied, that either from books, from conversation, or from the unfortunate speculation of her own mind, the mother has fallen into a fatal error, on a fundamental point of morals—the obligation of the marriage contract. It is the more incumbent on us, therefore, to guard the children against the consequences of this pernicious mistake. At the present moment, they may not reflect on the subject, but they soon will; and when they inquire why they were separated from their mother, they will be taught, as far as our opinions can teach them, that in good fortune or in bad, in sickness or in health, in happiness, or in misery, the marriage contract, unless dissolved by the law of the country, is sacred and inviolable. For these reasons, and many others which it is unnecessary to mention, I am of opinion that the children should be delivered to their father. But let him not be too abrupt in their removal, but to conduct the matter so as to avoid a violent shock either to them or their mother. (See *City-Hall Rec.* 1 *Vol.* 41. 149.)

3. An infant of intelligence, who does not understand the nature of an oath, appearing as a witness, will be instructed by the court, iii. 3
4. An infant under seven years is incapable of committing crime. Between that age and fourteen, if it appear on the part of the prosecution, that the infant is possessed of sufficient capacity, he may be convicted; but, as his age approximates the nearer to that of seven the inference in his favour is the stronger; and, as his age approximates the nearer to 14, the inference in his favour on the score of infancy, lessens, v. 137
5. If the circumstances under which a felony is committed by an infant, between seven and fourteen years of age, indicate that he was conscious that he was doing wrong while stealing, this is tantamount to evidence of his capacity, v. 178

See WITNESS, 3. 17.

Insanity.

Meriam's case, (7 *Mass. Rep.* 168.)

1. Where one who had been committed to the house of correction, as being a person dangerous to be permitted to go at large, was brought from that house, by order of the court, and tried and acquitted on an indictment for murder, he was remanded to the place from whence he had been brought.

The prisoner was indicted for the wilful murder of *David Bacon*, by shooting him. He had been occasionally deranged for several years, in consequence of which the Judge of Probate appointed a guardian to take charge of his estate, pursuant to the act; and, after *Bacon's* death, the prisoner, under the act of 1797, c. 62. sec. 3. had been committed to the house of correction, as one dangerous to go at large, by two Justices. In *October*, 1810, he was brought from that house, and was tried, but was acquitted on the ground of insanity, when he was remanded to the same place.

2. Jurors may be sworn to try the question, whether sane or not, at the time of trial, i. 6. n.
3. Not recognised as a defence in felony, where the prisoner had been subject to derangement, but had lucid intervals: the only question is, was he, at the time, capable of distinguishing good from evil? i. 176
4. Is a defence generally resorted to, when every other ground of defence has failed, i. 190
5. Should be clearly proved, when relied on for a defence, *ib.*
6. Not inferred from the commission of a horrid and unnatural crime, where the circumstances combined to show that

the prisoner was actuated by revenge or despair, ii. 85
7. That species of frenzy which is induced by violent passion, unless settled down into a state of total derangement, will not excuse the commission of an offence, iii. 123
8. Set up as a defence, where one, in a fit of jealousy, bit off the nose of his wife; but the defence failed, *ib.*
9. A defence, resting solely on the ground of insanity, is to be strictly scrutinized, i. 185. iii. 123

See PLEADING IN CRIMINAL CASES. MURDER, 15.

Insolvency.

1. A promise by an insolvent, after his discharge, to pay a debt due before, is not to be gathered from a declaration to the creditor, that he could not sign a note for the amount due then, but would do it by and by, i. 19

INSOLVENT ACTS.

2. Contracts, having been entered into between citizens of the same state, are to be understood as having been made in reference to the existing laws of the state, and under a tacit consent, that such contracts shall be governed or modified by such laws, iv. 97
3. The insolvent laws of the state of *New-York* do not impair the obligation of contracts, within the meaning of the constitution, *ib.*
4. A *bona fide* discharge, either under the former three fourth act, or the present two third act, in the state of *New-York*, is valid and effectual in securing the property of the debtor, subsequently acquired, from any judgment obtained, or any contract made, in this state, prior to such discharge, *ib.*
5. Different acts of insolvency in this state, when passed, iv. 98. n.
6. A state has a right to pass a bankrupt law, if it do not impair the obligation of contracts, iv. 107
7. The *New-York* insolvent law of 1811, is, in part, a law impairing the obligation of contracts, and, so far, furnishes no good plea in bar to an action, *ib.*
8. A discharge under the insolvent act of the third of *April*, 1811, does not discharge a debt contracted prior to the passing of that act, which, as impairing the obligation of the contract, is unconstitutional and void, iv. 160

Insurance.

1. Its general principles explained, ii. 1
2. In an action brought on a policy of insurance against loss or damage by fire, the plaintiff is not entitled to recover, should it appear that such fire was occasioned through the agency or by the procurement of the plaintiff, *ib.*
3. On the trial of such action, the defendant will be allowed to prove incumbrances by mortgages, on the property insured, previous to its insurance, either as an evidence of the real value, or of fraud, *ib.*
4. It seems, however, that exemplifications, or sworn copies of the registry of such mortgage, taken from the office of the clerk of a county in a foreign state, will not be received in evidence for the purpose of proving such incumbrances, *ib.*
5. Glaring frauds practised against insurance companies, ii. 61. 131

ON LOTTERY TICKETS.

6. Statute to prevent, iii. 53. n.
7. May be effected, and is punishable under the act, (2 *R. L.* 190.) by selling a chance, though the insurance was made for another, and the defendant was not interested, iii. 53
8. Indictment must allege that some *particular number* was insured, to be drawn on a *particular day*, *ib.*
9. Indictment alleged that the insurance was made for the 26th *February;* the proof was that the insurance was for the 38th *day's drawing*—held, a fatal variance, *ib.*
10. To agree to pay $ 5, in consideration of the receipt of a less sum, if a particular number be drawn on a particular day, is selling *a chance of a ticket*, within the meaning of the act, iii. 96
11. An act prohibited the registering and insuring tickets in any lottery *not authorized by the laws of this state*, under a penalty—held, that it was necessary, in an indictment under the statute, to name the lottery in which the defendant regis-

tered or insured; and further, that if the lottery, so named in the indictment, never existed, or was not drawing at the time or place stated in the indictment, that the prosecution could not be maintained,

vi. 98

Jurisdiction.

Godfrey's case, (17 *Johns. Rep.* 225.)

1. The land on which *Fort Niagara* is erected, never having been actually ceded by this state to the *United States*, still belongs to this state; and its courts have jurisdiction of all crimes against the laws of this state, within that *fort* and its precincts; though it has been garrisoned by the troops of the *United States*, and held by them since its surrender by *Great Britain*, pursuant to the treaties of 1783 and 1794; for the *United States* acquired no territory within this state by those treaties.
2. The right of exclusive legislation or jurisdiction, within the limits of any of the states, can be acquired by the *United States*, only by purchase of territory from the states for the purpose, and in the mode prescribed by the constitution of the *United States*.

The prisoner, having been convicted of the murder of *Thomas Branaghan*, at the *Niagara* Oyer and Terminer, was brought up on *habeas corpus*, in *October*, 1819, with the record of his conviction.

Facts: The prisoner and the deceased being fellow soldiers at *Fort Niagara*, the latter, while confined under guard, in a place called the "*black hole*," was stabbed by the former with a bayonet.

The question submitted was, whether this state had jurisdiction over offences committed within the territory of that fort.

On the argument, and in the opinion of the court, these facts seemed to have been assumed as *historical*:—1. The fortress, belonging to *France*, was ceded to *Great Britain* by treaty in 1763.—2. In the treaty between *Great Britain* and the *United States*, in 1783, *Great Britain* stipulated to withdraw her troops from all her garrisons in the *United States*; and, by the treaty of 1794, she stipulated to withdraw her troops and garrisons from all posts and places within the boundary lines assigned by the treaty of peace; and, since 1794, the fortress has been garrisoned by the *United States*.—3. By an act of this state, (1 *R. L.* 197.) the Governor is authorized to agree with such person as shall be authorized by the *United States* for that purpose, for the sale of such lands near *Fort Niagara*, as shall be necessary for the accommodation of that post, and to cede the right of the people of this state to the *United States*; but those powers, conferred on the Governor, were never exercised.

The case was ably argued, and the court decided—1. That the *United States* acquired no territorial rights over *Fort Niagara* by the treaties of 1783 and 1794; and that the surrender enured to the benefit of this state, inasmuch as the fortress was within the acknowledged boundaries of this state.—2. That the occupation of the post, since 1794, was no evidence of the right of the *United States* over the territory, but may rather be considered as resulting from a tacit acquiescence on the part of this state.—And, 3. That to oust this state of its jurisdiction over offences committed within its acknowledged limits, it must be shown that the crime is clearly and exclusively cognizable by the laws and courts of the *United States*. (3 *Wheaton*, 388. See also 4 *City Hall Rec.* 27.)

Sentence of *death* was passed on the prisoner.

Clary's case, (8 *Mass. Rep.* 72.)

3. The courts of *Massachusetts* have no jurisdiction over offences committed upon lands in *Springfield*, which have been purchased by the *United States* for the purpose of erecting arsenals, &c., to which purchase the consent of that state was granted by the statute of 1798, c. 13.

Before and at the time of the adoption of the constitution of the *United States*, divers buildings, for arsenals, containing quantities of guns and military stores, were erected in the town of *Springfield*, and occupied by the *United States*, and a number of persons were employed in manufacturing small arms by the general government. The President of the *United States* having been authorized by an act of congress to purchase lands in fee, and erect foundries, &c., in *June*, 1798, an act of that state was passed, giving consent that the *United States* might purchase a tract of land in *Springfield*, for that purpose, not exceeding 640 acres; and purchases, of divers persons, the owners of the land, accordingly took place. The defendant, being employed as an overseer in one of the water shops owned by the *United States*, within that tract, sold spiritous

liquors to the workmen in and about the buildings, without a license from the Common Pleas. A suit was commenced and prosecuted to conviction in that court; and, on an appeal to the Supreme Judicial Court, in *September*, 1811, it was held, *per tot. cur.*, that the general government had exclusive jurisdiction over offences committed within the tract so purchased by the *United States*.—(But see *Lent's* case, *ante*, vol. 4. p. 27. See also, *Godfrey's* case, 17 *Johns. Rep.* 225.)

Hudson and *Goodwin's* case, (7 *Cranch's Rep.* 82.)

4. The courts of the *United States* have no common law jurisdiction in cases of libel against the government of the *United States*. But they have the power to fine for contempts, to imprison for contumacy, and to enforce the observance of their orders.

This was a case certified from the Circuit Court for the district of *Connecticut*, in which, upon argument of a general demurrer to an *indictment* for a libel on the President and Congress of the *United States*, contained in the *Connecticut Courant* of the 7th of *May*, 1806, charging them with having, in secret, voted two millions of dollars as a present to *Bonaparte*, for leave to make a treaty with *Spain*; the Judges of the court were divided in opinion upon the question, *whether the Circuit Court of the United States had a common law jurisdiction in cases of libel.*

In *February*, 1812, the opinion of the Supreme Court of the *United States* was delivered by *Johnson*, J., to the following effect: The only question which this case presents is, whether the Circuit Courts of the *United States* can exercise a common law jurisdiction in criminal cases. We state it thus broadly, because a decision in a case of libel will apply to every case in which jurisdiction is not vested in those courts by statute.

This question has long been settled by public opinion. The powers of the general government are made up of concessions from the several states: whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the *United States* is a constituent part of those concessions; and, though congress may have power to confer on those courts common law jurisdiction of criminal offences, this has not been done by any legislative act.

Certain implied powers must necessarily result to our courts of justice, from the nature of their institution. To fine for contempt, imprison for contumacy, enforce the observance of order, &c. are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others: so far, our courts possess powers not immediately derived from statute. Judgment for the defendants.

In the case of *Ravara*, commenced in the Circuit Court of the *United States* for the *Pennsylvania* district, in 1793, (the defendant, a Consul from *Genoa*, being indicted for a misdemeanor, in sending anonymous and threatening letters to Mr. *Hammond*, the *British* Minister, and others, with a view to extort money,) there was a motion made by the defendant's counsel, to quash the indictment, on the ground that cognizance of the case belonged only to the Supreme Court of the *United States*, on account of his official character; but the court decided, that the Circuit Court had concurrent jurisdiction with the Supreme Court, and the motion was denied. (2 *Dall. Rep.* 297.)

But in the case of *Worrall*, (2 *Dall. Rep.* 384.) who was indicted in the Circuit Court of the *United States* for the same district, for a misdemeanor, in attempting to bribe *Tench Coxe*, Commissioner of the Revenue, by offering him £700, if he would give him a preference in the job of erecting a light-house on *Cape Hatteras*, for doing which *Coxe* had officially invited proposals, after a conviction in the case, a motion was made in arrest of judgment, principally on the ground, that the courts of the *United States* had not jurisdiction over offences at common law; and, after argument, Judge *Chase* delivered his opinion, that the indictment could not be sustained, because the constitution of the *United States* had not vested the Federal Courts with power to try offences at common law; and that whatever powers were not delegated by the constitution, were expressly reserved to the several states.—Judge *Peters*, however, was of a different opinion; and the court was equally divided on the question.

So in *Shaffer's* case, who was indicted and convicted in the Mayor's Court of *Phila-*

delphia, in 1797, for forging the names of several soldiers to powers of attorney, authorizing him to demand and receive their warrants for the donation lands granted them by acts of congress; it was moved in arrest of judgment, on the ground that the *United States* courts alone had jurisdiction in the case; but the Recorder, *Wilcocks*, after argument, pronounced the opinion of the court, that they had competent jurisdiction, and the motion was overruled. (4 *Dall. Rep.* App. xxvii.)

5. Of the place where the thief is taken, will not be regarded on his trial: it is sufficient, if the crime was perpetrated within the jurisdiction of the court, ii. 119
6. Of the Circuit Court of the *United States*, in a criminal case, discussed, ii. 144, 145, 146
7. Congress has no constitutional right to pass a law, assigning the Justices of the Supreme Court to hold a circuit; but they, having acquiesced in the act, for that purpose, an objection to the jurisdiction of the Circuit Court, in a criminal case, was held not well taken, ii. 131. 146
8. Notwithstanding the grant in the statute, (1 *R. L.* 189.) and the 8th section of the first article of the federal constitution, the *New-York* sessions has jurisdiction over criminal offences committed on *Governor's Island*, iv. 27

See Conspiracy, 21. Forgery and Counterfeiting, 84. Larceny, 7, 8, 9, 10. 25. Libel, 25, 26. Manslaughter, 2. Misdemeanor, 19. 27. Possession, 3. Receiving Stolen Goods, 1. Witness, 5.

Jury.

Fries' case, (3 *Dall. Rep.* 515.)

1. In a case of treason, after conviction, the court awarded a new trial, because one of the jurors had made declarations manifesting a bias on his mind against the prisoner.

In 1799, the prisoner was tried for *treason*, in the Circuit Court for *Pennsylvania* district, and after a trial of fifteen days, was convicted. His counsel afterwards moved for a new trial, on this, with other grounds: That one *Rhodes*, a juror, after he had been summoned, declared, at several places, at several times, and to several persons, "that he was not safe at home for these people," (meaning the insurgents, the prisoner being charged as one,) "that they ought all to be hung," and, particularly, "that *Fries* must be hung;" and, after argument, and solemn consideration, the court, for this reason, awarded a new trial.

M'Lean's case, (2 *Johns. Rep.* 381.)

2. A jury *de medietate linguæ* may be summoned *instanter*.

The prisoner, an alien, on arraignment in the Oyer and Terminer, suggested his *alienism*, and moved to put off the trial until the next term, that a panel of jurors *de medietate linguæ* might be summoned. The court ordered the sheriff to return such a panel *instanter*. The prisoner was convicted, and the question submitted to the court was, whether the proceeding was legal.

The court, in *August*, 1807, decided that the provision in the act concerning jurors, allowing eight days for summoning them, applies only to jurors to be drawn by the clerk as *qualified* jurors by law, and does not apply to an alien. The proceeding was, therefore, legal.

3. Are the judges of the law as well as the fact; but matters of form belong to the court, i. 22. iii. 13
4. When the name of one indicted, arraigned, and on trial with another, has been omitted, by mistake, in the body, though indorsed on the back of the indictment, the jury may acquit, or pass no verdict, or return a special one, i. 62
5. The affidavit of one of the jurors, after a verdict has been regularly entered, will not be received by the court, on a motion for a new trial, to impeach such verdict, i. 121
6. The consideration of the punishment of a crime, should never influence a verdict in a criminal prosecution: punishment is the province of the *court*, not of the *jury*, *ib.*
7. On retiring to deliberate, should not take out with them any paper, without consent on both sides, as it may vitiate their verdict, i. 147

8. Important duty of juries, in actions for personal injuries, i. 154
9. Indecorous in jurors to pronounce before they have heard the whole, or consulted with their fellow jurors, i. 158, n.
10. A juror, not belonging to the society of Friends, who declares, on being called as such, in a case of murder, that he was determined never to render a verdict, the consequence of which would be the death of a human being, is not exempt from serving on such jury, i. 185
11. Jury *de medietate linguæ* should consist of such aliens as understand our language, ii. 113
12. It seems, that where an indictment consisted of divers counts, some of which contained a charge for an indictable offence, and others not, it is the right of the party against whom a general verdict may be rendered, to inquire of the jury, on their return, whether they find the defendant guilty on all the counts, or on either, and which of them, and the jury are bound to answer such inquiry, but the party has no right to interrogate a jury as to the particular reasons or grounds of their verdict, iii. 13
13. A person called as a juror, on a trial for murder, who declared that he did not believe it right, in any case, for a man to suffer the punishment of death, was held unfit to be impanelled, iii. 45

CHALLENGE TO A JUROR.

14. Not well taken, in a case in which the juror declares, that if what he had heard, as a matter of common report, were true, he believed the prisoner guilty; but that he had formed no opinion which would influence his decision, i. 23
15. By a prisoner tried with another for forgery, doth not derogate from the rights of his associate on trial, i. 144
16. Is founded on some legal objection, and not on choice, *ib.*
17. Well taken by the public prosecutor, on a trial for murder, where a juror, not belonging to the society of Friends, on being called, declares, that he had determined, and still adhered to the determination, never to find a verdict, the consequence of which would be the death of a human being, i. 185
18. Such challenge to be tried by the two first jurors called and sworn, *ib.*
19. A challenge of a juror to the favour, on behalf of the prosecution, on the ground that the juror had entertained hostile feelings against the prosecutor, by reason of a transaction touching his official duties, is well taken on the traverse of an indictment for a libel, impeaching the official conduct of the prosecutor, ii. 89
20. A juror may be challenged, though the party taking the challenge, in the first instance, puts a question to the juror touching that which forms the ground of the challenge, iv. 81
21. The *two* jurors first called and sworn, are to be the triors to decide on the competency of a juror challenged, *ib.*
22. Where a challenge to the favour is taken, the specific cause need not be assigned previous to the trial of such challenge, *ib.*
23. A juror should stand wholly indifferent between the prosecution and the accused, and *free from all exception;* and if, on the trial of a challenge, circumstances appear sufficient to produce a doubt in the minds of the triors, whether such juror stands indifferent or not, it is their duty to reject him, *ib.*
24. Juror is competent, (whatever he may have read or heard,) who shall unequivocally declare, 1st. that he has not, at any time, formed or expressed an opinion, or even entertained an impression, which might influence his conduct as a juror; 2d, that he has no bias or prejudice on his mind for or against the prisoner; and 3d, that in every respect, according to the best of his knowledge or belief, he stands perfectly indifferent between the people and the prisoner, vi. 69
25. Rationality of the rule shown, vi. 71, 72. n.
26. That one called as a juror, in a case where the president and directors of a bank are prosecutors, is a stockholder in an insurance company, is not a disqualification; but if he be a stockholder in such bank, he is incompetent as a juror, *ib.*

Denton's case, (2 *Johns. Cases*, 275.)

27. The Sessions, in a case of misdemeanor, has power to discharge a jury without consent; but this rests in sound discretion, and ought to be exercised with caution.

The prisoner being indicted for a misdemeanor before the *Queens'* Sessions, the jury, after being out all night, and part of a day, could not agree, and the court, without his consent, discharged them. Being again indicted for the same offence, he removed the indictment to the Supreme Court by *certiorari*. In *April* term, 1800, that court decided, that though the power of discharging a jury, in such a case, was to be exercised with caution, yet it rested in sound discretion, and was properly exercised; and the prisoner, after pleading not guilty, was recognised to appear at the then next Oyer and Terminer for *Queens*.

Barrett and *Ward's* cases, (2 *Caines' Rep.* 100. 304.)

28. The court cannot, in a criminal case, after the jury is sworn, discharge them, because the public prosecutor has not certain evidence deemed essential; and the prisoner cannot afterwards be tried on the same indictment.

The defendants were indicted in the *Washington* Sessions, for a conspiracy; and after the jury was sworn, the district attorney served on *Barrett* a notice to produce a paper. It was not produced; and the prosecutor offered parol evidence of its contents. This was objected to by the defendants, as the paper was not in their possession, but fourteen miles distant, and sufficient notice to produce it had not been given. The judge refused to allow parol testimony; and the district attorney then moved that a juror should be withdrawn, and the jury discharged. This was granted without consent. Afterwards they were convicted on the same indictment; and, in *February*, 1805, the Supreme Court, after hearing arguments at great length, decided that discharging a jury, in a criminal case, ought not to be allowed except in cases of urgent necessity: that this was not such a case; and they advised that the prisoners should be discharged.

Meaney's case, (4 *Johns. Rep.* 294.)

29. If the jury, after being sworn in a criminal case, separate, they cannot, though sworn again, legally convict the prisoner; and it is doubtful whether he can ever be tried for the same offence.

The prisoner was indicted for grand larceny, in the *New-York* sessions, on several indictments. The jurors, by consent, were sworn to try him on all. On the first, they acquitted him; and while they were deliberating, another case was called on. They returned and rendered their verdict; and while the court was proceeding in the other case, the jurors sworn in the prisoner's cases inadvertently, and without being observed, separated, and some of them went into a tavern. They were again called to try him on the other indictments; and on an objection to this proceeding by his counsel, the same jurors were again sworn. His counsel refused to appear; and he was convicted in all the other cases. He was brought before the Supreme Court in *May*, 1809, on *habeas corpus;* and after argument, it was decided, that there was an irregularity in the case; but the court gave no opinion whether there ought to be a new trial or not; but recommended him for a pardon.

Bowden's case, (9 *Mass. Rep.* 494.)

30. In a case of necessity, a juror may be withdrawn and the jury discharged, in a trial for felony, and the prisoner be again brought to trial and convicted.

This was a case of *robbery*. The jury retired to consider upon a verdict; and after staying out a long time, returned without having agreed, saying, that it was not probable they ever could agree. A juror was withdrawn, without the prisoner's consent, and the jury was discharged. The prisoner was afterwards tried and convicted by another jury; and, in *March*, 1812, his counsel moved in arrest of judgment, on the ground, that the jury could not be discharged in a capital case even with the consent of the prisoner: nor in any criminal case without his consent.

Sed non allocatur: et per cur: The ancient strictness of the law upon this subject has very much abated in the *English* courts: nor would it be consistent with the genius of our government or laws to use compulsory means to effect an agreement among jurors. The practice of withdrawing a juror, where there existed no prospect of a verdict, has frequently been adopted at criminal trials in this

court, and the exception taken in this case cannot prevail.

So in the case of *Coolidge*, tried in the Circuit Court of the *United States*, (2 *Gall. Rep.* 364.) after the case was called on, one *Lee* being called as a witness refused to be *sworn*, on conscientious scruples, though not a quaker. The court committed him; and the district attorney was unable to proceed without his testimony. The court discharged the jury, and the prisoner was again brought to trial. (*See* also *Goodwin's* case, 18 *Johns. Rep.* 187. *S. C.* 5 *City-Hall Rec.* 52. 103. 181. 6 *ib.* 9, and authorities there cited.)

Wood and *Sherburn's* case, (12 *Mass. Rep.* 313.)

31. On the trial of W. and S. for larceny, the jury agreed on the acquittal of W., but as to S. they could not agree. The court discharged the jury, ordered that W. go, without day, and that the indictment should be continued as to S.

In *May*, 1815, the prisoners were indicted and tried for a larceny; and the jury, having retired some time, returned with a verdict acquitting *Wood;* but as to *Sherburn*, they stated that they were not able to agree; and being inquired of as to the prisoners severally, answered as before, respecting *Wood*, and that there was no prospect of their agreeing as to *Sherburn*. Whereupon, the court discharged the jury, let *Wood* go *sine die*, and recognised *Sherburn* for his appearance at the then next term.

32. In a case of felony, in the court of general sessions, in *New-York*, after a trial of five days, the jury were kept together seventeen hours to deliberate on a verdict, and after eleven o'clock in the evening of the last day of the term, returned into court, and declared there was no probability of their agreeing on a verdict, and were discharged—it was held that such discharge was a discreet and legal exercise of the powers of that court, and did not operate as an acquittal of the prisoner, v. 97

33. In cases, as well of felony as misdemeanor, where an absolute necessity exists for discharging a jury, the court, in its discretion, may discharge them, and the prisoner may be again brought to trial for the same offence, *ib.*

34. Where an indictment for a felony alleged the offence to have been committed on a day subsequent to that on which the indictment was found, it was held that a juror might be withdrawn, and the jury discharged without consent, and the prisoner brought to trial, for the same offence, on another indictment, v. 108

35. A juror, when inquired of by the Court whether he has formed an opinion on the merits, is to answer under oath; but his answer shall not preclude either party challenging him, from establishing facts by proof for the purpose of disqualifying him as a juror, v. 15

36. Where a challenge to the favour is interposed by the public prosecutor, on the ground that the juror called had declared, on being called, that he was opposed, on principle, to the infliction of capital punishment, it was held that he was a competent witness before the triors, v. 141

37. That a jury, for the purpose of arriving at a measure of damages for an assault and battery, agreed that each should mark down a sum according to his opinion, and then that the amount should be divided by 12, and that the quotient thence arising should be the verdict, is an irregularity sufficient to destroy such verdict; but this cannot be shown by the affidavit of the jurors, and much less from the affidavit of one who heard it from one of them, v. 85

See Conspiracy, 1. Libel, 1. 4. 6. Murder, 7. 14. New Trial, 2. 4, 5, 6. Venire. Verdict.

Kidnapping.

1. Any person of colour, slave or not, is an offence within the 29th section of the "act concerning slaves and servants." ii. 120

2. Thirteenth section applies where the owner, residing in this state, without regarding the exceptions in other parts of the act, exports, or attempts to export, his slave or servant, *ib.*

3. One alleged to be free by reason of an attempt to export him contrary to the act, cannot be admitted as a witness for the prosecution, unless it appear,

from extrinsic evidence, that he has actually become free, ii. 120

4. In such case, the record of a former conviction of one who, with defendant, attempted to export such black, is not admissible on behalf of the prosecution, *ib.*
5. Carried to an alarming height, ii. 128
6. An act of *New-Jersey*, of 1812, provided, that before any negro should be removed into any other state, a judge should, after examining him or her, give a certificate that such removal was with the free will and consent of such negro. On the 7th of *Nov.* 1818, R. having purchased a black woman in the state of *New-Jersey*, and having duly obtained such certificate, removed her out of that state. But on the 5th of *November*, 1818, the legislature of *New-Jersey* passed an act, providing that no negro should be removed out of the state, except under certain circumstances, which did not apply to the removal by R.; and that if such negro should be removed, contrary to the act, he or she should be free. It was held, that by such removal such woman became free, iv. 47
7. On the traverse of an indictment under the act, for kidnapping or inveigling a negro, with intent to send him out of the state, it is not necessary to show, either that force was employed by the defendant, or that it was against the will of such negro, iv. 172

See HABEAS CORPUS. SLAVE.

Larceny.

Payne's case, (6 *Johns. Rep.* 103.)

1. Taking away a letter which is of no intrinsic value, nor importing any property in the owner, is not larceny.

The prisoner was convicted, by a special Sessions of *Oneida*, for stealing a letter, described, on the trial, as "a piece of paper, on which a certain letter of information was written of the value of $12 50." It appeared that the letter, which was from one *Huson* to *Pierson*, relative to one *Campbell*, who was suspected of murdering one found dead in *Vernon*, was delivered by *Pierson* to the prisoner to read. He ran off with it, and was pursued and taken; and the special justices fined him $8 74.

The case being brought before the Supreme Court, by *certiorari*, in *May*, 1810, they decided, that as the letter was of no intrinsic value, and imported no property in *Pierson*, that the carrying it away constituted no criminal offence; and they quashed the conviction.

Holbrook's case, (13 *Johns. Rep.* 90.)

2. Parol evidence of the existence of bank bills stolen, may be given without accounting for their non-production.
3. Bank bills may be laid, in an indictment, as the *goods* and *chattels* of the owner, without stating them to be *his property*.
4. A bill of exceptions lies not in a criminal case.

The prisoner was convicted at the *Oneida* Sessions for stealing $200, in four bills of 50 dollars each of the Mechanics' Bank, the *goods* and *chattels* of *Peleg Clark*, and on the trial it appeared that parol evidence was admitted of these bills, without accounting for their non-production, though this was objected to.

The two principal points raised and argued before the Supreme Court, in *January*, 1816, were, 1. Whether describing the property as the *goods* and *chattels* of *Clark*, was a sufficient description of ownership; and, 2. Whether the bills ought not to have been produced, or their non-production accounted for?

The court decided the first point in the affirmative. (2 *East's C. L.* 749. 2 *Black.* 385.) And the second point in the negative. (1 *Campb. N. P. Cases*, 143. 3 *B.* and *P.* 143. 14 *East's Rep.* 274.) The conviction is right.

Smith and *Titcomb's* case, (1 *Mass. Rep.* 245.)

5. In an indictment for stealing money, the *value* must be averred.

Indictment for stealing one chest of the value of $2, thirty *Spanish* milled dollars, ten *French* crowns, and one hundred and sixty dollars, in other cash, consisting of quarters, eighths, and sixteenths of a dollar, of the goods, &c. of *John Colby*.

After conviction, it was moved in arrest of judgment, on the ground that the value of the money ought to have been averred; and after argument, it was held, in *Nov.* 1814, *per Sedgwick*, *Sewall*, and *Thatcher*, Justices, that judgment for treble da-

mages could not be given for any thing but the chest; and as to the rest, the judgment might be arrested. The consequence would be, that the prisoners would be recognised to appear and answer to another indictment; but they consented to have this one amended by inserting the value of the money stolen. (See 2 *Hawk.* c. 25. sect. 75. *Ib.* c. 33. sect. 59.)

Hill's case, (14 *Mass. Rep.* 207.)

6. One deaf and dumb may be convicted of larceny.

On arraignment of the prisoner, the Solicitor General suggested that he was deaf and dumb; but that the proof would be, that he was of sufficient capacity to be a proper subject for a criminal prosecution; and he moved that one *Nelson*, an acquaintance of the prisoner, should be sworn to interpret the indictment to him as it should be read by the clerk. This was done, sentence by sentence, and interpreted by signs. The trial then proceeded as on a plea of not guilty.

Cullin's case, (1 *Mass. Rep.* 115.)

7. Stealing goods in *Rhode Island*, and carrying them into *Massachusetts*, is indictable and punishable in the latter state.

On an indictment for larceny, in *October*, 1804, the prisoner was convicted for stealing 98 handkerchiefs, the goods of *Hannah Healy*. The goods were stolen in *Rhode Island*, and brought by the prisoner into *Massachusetts*; and *Sedgwick*, J., instructed the Jury, (*Strong* and *Thatcher*, Justices, present,) that stealing goods in one *state* and carrying them into another, was similar to stealing goods in one *county* and conveying them to another, which was always holden to be felony in *both* counties. The prisoner was convicted. (See *Andrew's* case, 2 *Mass. Rep.* 14. But see 2 *Johns. Rep.* 477. *Gardner's* case.)

Gardner's case, (2 *Johns. Rep.* 477.)

8. One who steals goods in *Vermont*, and brings them into *New-York* state, cannot be tried here; he is but a fugitive from justice: but he could be tried and punished here, if he had stolen goods in one county in this state, and brought them into another.

The prisoner stole a horse in *Vermont*, and it was found in his possession in *Washington* county, in this state. The question was submitted to the Supreme Court, whether he could be tried and punished here; and, in *November*, 1807, it was decided, that he could not. When the original taking is out of the jurisdiction of this state, the offence does not continue and accompany the possession, as it does where goods are stolen in one county, and are found in possession of the thief in another county, in the same state. He is but a fugitive from justice. (2 *East's P. C.* 774.) *Sed contra*, 2 *Mass. Rep.* 14.

Schenck's case, (2 *Johns. Rep.* 479.)

9. One stole goods in *New-Jersey*, and they were found in his possession in *New-York*; it was held, that though he could not be tried for the offence *here*, yet that he ought to be detained in prison 3 weeks, and notice given to the Executive of *New-Jersey*, and, if not demanded in that time, to be discharged.

On special verdict from the Sessions of *New-York*, stating, in effect, that the prisoner stole a gun in *New-Jersey*, and offered it for sale in *New-York*, the Supreme Court, in *November*, 1807, (the case being brought up by *certiorari*,) decided, on the authority of 2 *Johns. Rep.* 477, that the prisoner was entitled to his discharge; but they ordered him to be detained 3 weeks in prison, and notice to be given to the Executive of *New-Jersey*; and if, in that time, he was not demanded, that he should be discharged. (See 5 *Binn. Rep.* 617.)

Simmon's case, (5 *Binn. Rep.* 617.)

10. One who stole goods in *Delaware* state, and brought them into *Philadelphia*, was held not indictable there, but a fugitive from justice.

On error from the Supreme Court, to the Mayor's Court in *Philadelphia*, on conviction on special verdict, found at that court, stating that the prisoner stole the goods in the state of *Delaware*, and brought them into the city of *Philadelphia*, and within the jurisdiction of that court; but whether, &c.

The Chief Justice, in *July*, 1813, on the authorities of the cases, (2 *Johns. Rep.* 477. 1 *Mass. Rep.* 116. 2 *ib.* 14.) pronounced the opinion of the court, (*Breckenridge*, J. dissenting,) that the offence stated in the special verdict was not indictable in *Philadelphia*, the prisoner being but a fugitive from justice; but they directed that he be detained in prison *three weeks*, and notice given to the Exe-

cutive of *Delaware*. (See *Schenck's* case, 2 *Johns. Rep.* 479.)

Spangler's case, (3 *Binn. Rep.* 533.)

11. An indictment for stealing bank notes, generally, under the description of promissory notes for the payment of money, is bad. It should appear, on the face of the indictment, that they are bank notes of some *incorporated* bank; or, in some way, that they are lawful notes; no unincorporated bank notes in *Pennsylvania* being, at present, (1811,) the subject of larceny.

Error to the Quarter Sessions of *Dauphin* county, (*Pennsylvania*,) from the Supreme Court, in *May*, 1811.

The defendant was convicted of larceny, in stealing three several promissory notes, commonly called bank notes, of $5 each, and of the value of $5 each, &c.; and the error assigned was, that the indictment did not state the bank which issued the notes. By the act of the 5th of *April*, 1790, in that state, it is enacted, that robbery or larceny "of promissory notes for the payment of money," shall be punished in the same manner as robbery or larceny of any goods or chattels. By an act, 30th *January*, 1810, it is enacted, that any robbery or larceny of any bank note of any *incorporated bank*, shall be punished, &c.; and, by another act of that state, (19th *March*, 1810,) it was rendered unlawful for any association of persons, who were not *incorporated* by law, to issue or utter any notes in the nature of bank notes, &c.

From a consideration of these acts, and the whole law in relation to the subject, the court, after argument, decided, that the error was well assigned, and they reversed the judgment.

Boyer's case, (1 *Binn. Rep.* 201.)

12. In an indictment for stealing bank notes, they should be laid to be *promissory notes for the payment of money*.

13. *Quere*: Whether an indictment is bad, for laying bank notes as the goods and chattels of the prosecutor? (Decided in the negative, 13 *Johns. Rep.* 90.)

The prisoner was convicted before Chief Justice *Tilghman*, and *Smith*, J., at the *Philadelphia* Oyer and Terminer, for larceny; having been indicted for a highway robbery, committed on *John Duffey*, on the 1st *May*, 1806.

The indictment stated, in effect, that the prisoner robbed *Duffey* of *two* $10 *notes of the President, Directors and Company of the Bank of the United States, one* $10 *note of the Bank of North America*, &c., being altogether of the value of $38, of the *goods and chattels* of *Duffey*, &c., against the statute and the peace, &c.

In *February*, 1807, the counsel for the prisoner moved in arrest of judgment, on two grounds. 1. It is not stated in the indictment that the notes stolen were *promissory notes for the payment of money*, and therein the indictment does not pursue the words of the act, (15 *April*, 1790,) which, in the enumeration of matters, the robbery or stealing of which are, by the act, rendered felony, describes effects of this description in those words; and to steal notes is not larceny at common law. —2. Because the indictment laid the property alleged to have been stolen, to be *the goods and chattels* of *John Duffey*.

The court arrested the judgment on the first ground, because the description of the notes in the indictment was not pursuant to the words of the statute; but, as it was held unnecessary, no opinion was given on the second point; but the Chief Justice, in his opinion, said, that he thought it more correct to lay the goods to be the *property* of the person from whom they are stolen. (But see *Holbrook's* case, 13 *Johns. Rep.* 90.)

Messinger's case, *et al.* (1 *Binn. Rep.* 273.)

14. Upon the traverse of an indictment for stealing a bank bill, note, &c., evidence of the contents of the instrument may be given, without showing a notice to the prisoner to produce them.

The defendants having been convicted of larceny, at the *Northampton* Quarter Sessions, in *Pennsylvania*, for stealing *a bill obligatory*, on their trial, the prosecutor proved the contents of the bill, without notice to them to produce it, (though objected to,) and they were convicted; and, in *March*, 1808, they moved the Supreme Court in arrest of judgment; because parol evidence of the contents of the note ought not to have been admitted, before proving a notice for them to produce it at the trial.

The court decided that, before and after the *Revolution*, it had been usual to prove the contents of papers of this description, without giving notice. The in-

dictment, describing the instrument, is, in effect, *the notice*. Motion denied.

See the same point decided, 13 *Johns. Rep.* 90.

15. Larceny defined, i. 83. n.
16. To constitute this offence, there must be not only a taking, but a felonious intention, *ib.*
17. In an indictment for this offence, where partnership property is stolen after the death of one of the partners, the ownership of the goods may be laid in the surviving partner and the executors of the deceased, without otherwise naming them, i. 3
18. The ownership of goods, in an indictment for this offence, may be laid in him who hath only a qualified property in them, i. 29
19. Grand larceny cannot be divided into several petit larcenies, i. 4
20. Several, aiding, abetting, and assisting in the commission of this offence, are all equally guilty, *ib.*
21. To remove goods from their place of deposit, with a felonious intent, constitutes stealing, i. 30
22. Remarkable cases of stealing, i. 51, 52. 114, 115. 135. 166
23. Cannot be divided into several larcenies; and, where several indictments were found, for larcenies committed by one at *the same time*, the District Attorney was required to select one for trial, and enter a *nolle prosequi* on the others, ii. 37
24. Where two are tried together, and some evidence appears of their acting in concert, the jury will not be advised to acquit the one, that he may be a witness for the other, ii. 38
25. May be committed by stealing goods on the *high seas*, and bringing them within the jurisdiction of the court; *aliter*, if stolen in another state, ii. 45
26. Consists in the *intent;* and where goods of small value were taken, either through *mischief* or for *retaliation*, held no stealing, i. 177
27. The mayor and aldermen of the city of *New-York* have a right to try a prisoner on a charge of stealing corporation notes, when in circulation, i. 30
28. The identity of new goods, on which the owner has put no particular mark, is proved by circumstances; and positive proof thereof not to be expected, nor is it required, i. 65. 115
29. Where stolen property is returned to the owner, by a person who, at the time, gives an account of his possession, it was held, that such account might be received in evidence as part of the *res gestæ*, iv. 91
30. Guilt may be as well inferred from false and inconsistent accounts given in the attempt to show that the goods were *received, knowing them to be stolen*, as in attempting to show they were obtained *honestly*, iv. 157
31. A carrying away, technically, and an entire possession necessary, iv. 177
32. Goods taken up, tied by a string which is not severed, not stealing, *ib.*
33. Authorities applicable to *carrying away* collected, iv. 178
34. In stealing *promissory notes*, statute extracted, iv. 36, n.
35. In an indictment containing several counts, for grand larceny, the prisoner cannot be convicted of that offence, unless it appear on the face of the indictment, and in proof, that he stole more than $25, laid in one of those counts, iv. 132. v. 174
36. If property is stolen, and but a part is found in possession of a prisoner, this shall be sufficient to charge him with the possession of the whole, should the jury believe that it must have been stolen at the same time, iv. 118. 139
37. Intending to rob a henroost, and taking away the *padlock*, through alarm, on detection, is not stealing, v. 8
38. *Quere*, Is a padlock to an out-house *a fixture?* *ib.*
39. Committed by removing and leaving goods in a convenient place, from which they are afterwards carried off by a coadjutor, v. 94
40. Committed by the least removal of goods, v. 169
41. Authorities on *removal of goods* cited, *ib.* n.
42. The felonious intent is derived from the act; and when one comes, as the pretended agent of another, and inquires of another, having charge of a quantity of iron for sale, the price, and whether the pretended principal can have a specific quantity, and is inform-

ed that he can have such quantity at a certain price; but without further conversation such agent takes away the iron secretly, and converts it to his own use; it was held that he was guilty of a felonious taking. vi. 56

43. To obtain possession of the goods of another by an artifice, promising to pay cash on delivery, but when delivered presenting an order with his acceptance thereon, payable at a future time, is not larceny, vi. 62

44. Possession of stolen goods, will not always render it incumbent on the accused to account for such possession, vi. 65

45. The market, and not the prime cost of goods, is the true criterion of their value, in larceny, where the value is in question, i. 29

46. Cannot be committed, by taking and carrying away, in a felonious manner, notes not payable in money, i. 30

47. To cut off and carry away lead from the roof of a building is not a felony; but if, after the separation, the lead is left near the place, and subsequently carried away feloniously, this is a felony, iii. 58

48. A lottery ticket, before the drawing of the lottery, is neither an order for the payment of money, nor a certificate for the payment of money, nor a public security; and is not the subject of larceny under the statute, iv. 36

CONSTRUCTIVE.

Anderson's case, (14 *Johns. Rep.* 294.)

49. A *bona fide* finder of an article *lost*, as a trunk containing goods lost from a stage coach, and found on the highway, is not guilty of *larceny* by any subsequent act, in secreting or appropriating to his own use the goods found.

The prisoner having been convicted of felony, in stealing a trunk, at the *Otsego* Oyer and Terminer, before Chief Justice *Thompson*, was brought before the Supreme Court in *August*, 1817, and his case was argued.

It appeared on the trial that the trunk was lost from a stage coach, on the highway, and was afterwards found there by the prisoner, who took and carried it away. It was urged, on his behalf, that property lost or abandoned by the owner, and afterwards found, was not the subject of larceny. The question was reserved as a question of law for the court; but the chief justice further directed the jury, that if they believed that the prisoner *first* took the trunk, with intent to steal it, they ought to convict him, and that they had a right to look at his subsequent conduct, and all the circumstances, in determining the question.

The case was well argued, and the court decided (the Chief Justice dissenting) that the prisoner was convicted illegally. He was discharged. (3 *Inst.* 107. 1 *Hale's P. C.* 506. 1 *Hawk.* 208. sec. 1 & 2. 2 *East P. C.* 663. 1 *Hawk. Ch.* 33. *Kelyng*, 24. *Dalton*, 3. 2 *East's C. L.* 695.)

Brown's case, (4 *Mass. Rep.* 580.)

50. If one to whom a wagon load of goods, consisting of several packages, is delivered, to be transported from one place to another, fraudulently take away one of the packages, such taking is a felony.

The prisoner was indicted for larceny, in stealing two pieces of cloth, the property of one *Willis*, and under the following facts: that the property, with other goods, making a wagon load, were delivered by the owners (Messrs. *Bridge*) to *Willis*, a common carrier, to be transported from *Boston* to *Sudbury;* that *Willis*, by reason of an accident on the road, employed the prisoner to drive the load, who took away the goods which were in a package, among other goods, in the bottom of the wagon. The judge, on the trial, charged the jury, that if they believed the prisoner took the goods, fraudulently, either before or after the load was delivered at *Sudbury*, to convict him. He was convicted, and, in *November*, 1808, moved for a new trial, and it was urged, that the embezzlement of a *whole package*, after goods came legally into possession of a carrier, was not a felony; otherwise, had he taken part of it. *Sed non allocatur; et per tot. cur.:* admitting him to be a carrier, the whole of the goods in the wagon, in a mass, were delivered to him, and when he took away a part of them, without the owner's consent, it was as much a severance as if he

had taken but part of a package; but he was not a common carrier; he was but a servant to *Willis*. Motion denied.

51. Committed by an hostler in selling his master's horse, and receiving the avails, without authority; and it was left to the jury, from the facts, whether, when the hostler rode off the horse, he intended *then* to convert the avails to his own use, ii. 157

52. Not committed where the evil intent was not *harboured at the time*, though it might be afterwards, v. 137

53. Committed by the obligor of a bond in getting it fraudulently from the obligee, an old, ignorant woman, and making use of various shifts and evasions, and finally withholding it, and the money due on it, from her, *intending when he obtained the bond*, to deprive her of the money, iii. 129

54. Not inferred against a lad of tender years, in taking a check from his principal, which was presented and paid at the bank, unless the circumstances are very strong, and it appear that he had some agency in drawing out the money, *ib.*

55. Committed by a lad, taken on trial, who, on being sent with goods to a particular place, sold them at auction, and kept the money, iii. 154

56. Committed by one who bought goods at a store, pretendedly for a rich lady, and, requesting that a boy should be sent with him for the money, went off; intending, *when he got them*, to steal them, *ib.*

57. The prisoner not liable, in such case, for obtaining the goods by false pretences, the false representation not having induced the delivery, *ib.*

58. Committed in a pretended purchase of goods *for cash*, by making false representations; *aliter*, if *on credit*, iv. 33.

59. Not committed by a pretended purchase of a pair of shoes, by leaving with the shoemaker a pair of boots, worth more than the shoes, for repair, promising to pay for the shoes when the boots were done; but obtaining the boots by fraud, and not paying for the shoes, *ib.*

60. Committed in selecting and purchasing goods, at a store, *for cash*, to be paid to the one whom the store-keeper would send with the pretended purchaser, in care of the goods, and obtaining the goods from him by a spurious check, iv. 46

IN EMBEZZLING.

61. Where a baker intrusted his boy with a basket of cakes, to sell and return the money, who sold the cakes, spent the money, and neglected to return the basket, it was held, that he was not guilty of stealing or embezzling the cakes or basket, iv. 159

62. In expounding an act, we are to take its title, preamble and enacting clause, or clauses, in connexion, and judge from the whole what its meaning is, vi. 69

63. The words of an act, in effect, were, that if any clerk, by virtue of such employment, shall take, secrete, embezzle, *or* make way with money, notes, &c., he shall be guilty of felony; and in an indictment, under the act, one was charged with having *feloniously* taken, secreted, embezzled *and* made way with, &c.—held, that the words of the act were sufficiently pursued, and that there was no variance, *ib.*

64. An indictment alleged, in effect, that a prisoner was employed and intrusted by the President and Directors of a bank, as a clerk, to receive money, bonds, bills, notes, &c. and that, by virtue of such employment and intrustment, he received such money, &c. and embezzled it, &c. It appeared in proof, that the prisoner, at the time of the alleged embezzlement, was acting as such clerk, having previously given a bond to the President and Directors for the faithful performance of his duties; that according to the custom of the bank, it was one of the incidental duties of the Cashier, in the management of its internal affairs, to make any change he deemed necessary, in the employment among the clerks, and that the prisoner was employed by the Cashier, and acted with the assent of the board; but without any formal corporate act done by them—held, 1. that the prisoner was a clerk, and 2. that he was employed and intrusted by the bank, *ib.*

65. The prosecutor, in a felony, whose goods have been mingled with other

stolen goods of the same kind, stolen from others, on the conviction of the thief, is entitled to a full restoration, should enough be found on the thief, i. 113

66. How far the prosecutor, on conviction of the felon, is entitled to restitution in a peculiar case, iv. 113

See AIDING, ABETTING AND ASSISTING. AUTREFOIS ACQUIT, 5. BURGLARY, 6. 10. COMPOUNDING. DESCRIPTION OF PROPERTY. EVIDENCE, 16, 44. INDICTMENT, 1. JURY, 31. LIBEL, 19. OWNERSHIP. PARDON. POSSESSION, 1, 2, 3. 8. 10, 11, 12, 13. RECEIVING STOLEN GOODS. ROBBERY, 2. 18.

Libel.

Croswell's case, (3 *Johns. Cases*, 337.)

1. On an indictment for a libel, can the defendant give the truth in evidence? Are the jury to decide both on the *law* and *fact*? But, now see 2 vol. R. L., p. 553, declaring that they may so judge, and that the truth may be given in evidence, if the matter alleged to be libellous was published with good motives, and for justifiable ends.
2. On the traverse of an indictment for a libel, in a particular number of a periodical publication, the public prosecutor will be allowed to read passages from any part of the work, to show the *quo animo*.

The defendant, a printer, was indicted in the *Columbia* sessions, for a libel, published in the *Wasp*, against *Thomas Jefferson*, esquire, President, &c. alleging that he paid one *Thomas Callendar*, for calling *Washington* a traitor, a robber and a perjurer; and for calling *Adams* a hoary-headed incendiary, &c.

The case was removed into the Supreme Court by *certiorari* in *January* term, 1803, and was tried before Mr. Justice *Lewis*. An application was made to him, at the circuit, to put off the trial, on the ground stated in an affidavit, of the absence of *Callendar*, a material witness, by whom the defendant expected to prove, among other things, that *Callendar*, being the author of a pamphlet, entitled, "*The Prospect before Us*," in which *Washington* and *Adams* were slandered as aforesaid, *Jefferson* paid *Callendar* $100, as a reward for writing the pamphlet, &c.

The Judge refused to postpone the trial; and after the proof of the publication, directed the jury, among other things, that they were to judge of the *fact* of the publication alone; and had no right to judge of the intent, as this was a matter of *law*, belonging exclusively to the court. (3 *Term Rep.* 428. n.)

In the course of the summing up, on the part of the prosecution, the *Attorney General* offered, for the purpose of showing the *intent* of the defendant, in publishing the libel set forth in the indictment, to read certain passages from Number 7, of "*The Wasp*," (in which Number was the alleged libel) and the prospectus contained in the first Number, which had not before been shown, or pointed out to the defendant's counsel, or read in evidence. To this, objections were made; but the Chief Justice decided that the prosecutor had a right to read such passages, from such Numbers of the *Wasp* as he thought fit.

The defendant was convicted; and his counsel, Messrs. *Hamilton*, *Harison* and *W. W. Van Ness*, moved for a new trial, which was opposed by *Spencer* (Attorney General) and *Caines*; and after a learned and elaborate argument, on both sides, in which a full view was taken of all the authorities, the Supreme Court was equally divided on the questions submitted. *Spencer*, having been counsel, gave no opinion; but Justices *Kent* and *Thompson* were of opinion for a new trial: Chief Justice *Lewis*, and *Livingston*, Justice, were of a contrary opinion.

On the 6th of April, 1805, an act was introduced into the Legislature, by *W. W. Van Ness*, Esquire, then a member, declaring, in effect, that the jury, in a case of libel, have a right to judge of the law as well as the fact; and that the truth of the matter may be given in evidence, *provided*, that such evidence shall not be a justification, unless, on the trial, it shall be further made satisfactorily to appear, that the matter charged as libellous, was published with good motives, and for justifiable ends. (2 *R. L.* 553.) And by reason of this declaratory act, the court, in *August* term, 1805, unanimously awarded a new trial in this case.

Lyle v. *Clason*, (1 *Caines' Rep.* 581.)

3. Sending a libellous letter to the libelled party, will not enable him to support an action for damages; for the *gist* of the action is the

publication; otherwise in a criminal prosecution; for there the *gravamen* is the excitement to a breach of the peace.

Clason, in *New-York*, sent an open letter to *Lyle*, in *France*, who brought an action for a libel contained, as was alleged, in the letter; and these facts appearing on the Record (judgment having gone by default) *Clason's* counsel moved in arrest of judgment; and the court, in *February*, 1804, decided, that as in a suit for damages, in the case of a libel, the publication was the *gist* of the action, and as no publication took place in this case, the action was not maintained; but it would have been otherwise in a public prosecution; for there the *gravamen* is the excitement to a breach of the peace.

Dennie's case, (4 *Yeates' Rep.* 267.)

4. The court will not question the jury before they are sworn, whether they have prejudged the cause, but will admonish them if they do not stand *indifferent* to either party, that they should disclose it to the court.
5. It is no libel to publish the truth from good motives, and for justifiable ends, though it reflect on the government or magistrates. *Aliter*, when done with an evil intent.

These points were decided at *nisi prius*, in *Philadelphia*, in *November*, 1805, in a libel case against the defendant, then editor of the *Port Folio;* and the libel, which follows, was alleged to have been printed and published, with the intent of bringing into contempt and hatred the constitution and government of the *United States* and of *Pennsylvania*, to condemn the principles of the Revolution, and to involve both the *United States* and *Pennsylvania* in civil war, &c. "A *Democracy* is scarcely tolerable at any period of national history. Its omens are always *sinister*, and its powers are *unpropitious*. With all the lights of experience blazing before our eyes, it is impossible not to discover the futility of this form of government. It was *weak and wicked* at *Athens;* it was *bad* in *Sparta*, and *worse* in *Rome*. It has been tried in *France*, and terminated in *despotism*. It was tried in *England*, and rejected with the utmost *loathing and abhorrence. It is on its trial here, and its issue will be civil war, desolation and anarchy.* No wise man but discerns its *imperfections;* no good man but shudders at its *miseries;* no honest man but proclaims its *fraud*, and no brave man but *draws his sword against its force*. The institution of a scheme of polity so *radically contemptible and vicious*, is a memorable example of what the *villany* of some men can devise, the *folly* of others receive, and both establish, in despite of reason, reflection and sensation."

Before the jury were sworn, the defendant's counsel moved the court that the jurors be asked, before sworn, whether they had declared an opinion; and they cited the case of *Fries*, (printed trial, 177) and also the case of Lord *Balmerino*, (1 *St. Tri.* 470—1.)

The motion was opposed by the Attorney General, on the ground that such a question involved discredit on them, and that no such practice had ever prevailed in the *English* courts.

The court refused to put the question to the jurors, declaring that if any of them did not feel themselves *indifferent*, or had prejudged the case, or had so *declared*, it was their duty to mention it to the court. (*See Cook's* case for High Treason, in 1696, 4 *St. Tri.* 749. Also, *Ante*, 1 vol. 23. 6 vol. 69. 71, 72, n.)

On the trial, the freedom of the press, and the rights of citizens to communicate their thoughts and opinions freely, on all political subjects, were amply discussed. *Yeates*, Justice, in his charge to the jury, adopted the definition of a libel, given by *Hamilton* in *Croswell's* case, (3 *Johns. Cases*, 337.) and left the case to the jury on the *quo animo*. If they believed that the defendant, *seditiously*, *maliciously* and *wilfully*, aimed at the Constitution of the *United States* or *Pennsylvania*, they should convict him; but if the production was honestly intended to inform the public mind, and warn them against supposed dangers in society, though the subject may have been treated *erroneously;* or, that the censures on *democracy* were bestowed on *pure unmixed* democracy, where the people, *en masse*, execute the sovereign power, without the medium of their representatives, (agreeably to our forms of government,) as have occurred, at different times, in *Athens*, *Sparta*, *Rome*, *France* and *England*, they should acquit; for, in the first instance, the act would be criminal; in the last, innocent.

He was acquitted.

Duane's case, (1 *Binn. Rep.* 601.)

5. After conviction, but before *sentence*, an act was passed, that, after the passing of the act, no person should be subject to *prosecution*, by indictment, for the offence of which the defendant had been convicted; held, that no judgment could be legally passed.

The defendant, in *December*, 1808, was convicted of publishing a libel against *M'Kean*, late Governor of *Pennsylvania*, *in his official capacity*; and before sentence was passed, a statute was enacted in that state, declaring, that after the passing of the act, no person *should be subject to prosecution* BY INDICTMENT, in any courts of the State, for the publication of papers examining the proceedings of the Legislature or any branch of Government; or for investigating the official conduct of officers, or *men in a public capacity*.

In *April*, 1809, the question was fully argued in the Supreme Court of *Pennsylvania*, whether sentence could legally be passed; and the court decided that it could not. The Chief Justice, in his opinion, considered the word "*prosecution*," in the act, as tantamount to the whole proceedings in a criminal case, of which the most important part was the judgment of the court.

Judgment arrested.

Sharff's case, (2 *Binn. Rep.* 514.)

6. A *general* verdict of a jury, in a criminal case, must be, substantially, either that the defendant is guilty or not guilty *of the offence laid in the indictment.*

Error to the Quarter Sessions of *Dauphin* county, *Penn.*

The defendent having been indicted for writing and publishing a libel on the characters of *Michael Ley* and *Leonard Ramler*, and also upon the memory of *John Ramler*, deceased, was tried by a *German* jury, who found the following verdict: "Guilty of writing and publishing *a bill of scandal* against *Ley* and *Rambler*, but not guilty as to any *Ramler*, deceased."

The principal error assigned and argued was, that the verdict does not find the matter in issue at all. *A bill of scandal*, whatever it may be in *German*, does not mean a *libel* in *English*.

On the other side it was insisted, that the verdict was not defective; there was but a clerical mistake in the entry, which might be amended.

The Supreme Court of *Pennsylvania*, in *June*, 1810, decided that the verdict was defective; for it was not certain that the jurors meant, by a bill of scandal, the offence set forth in the indictment. Judgment reversed.

Clap's case, (4 *Mass. Rep.* 163.)

7. The truth of the words is no justification in a criminal prosecution for a libel; but the defendant may show the purpose of the publication to have been justifiable, after which he may give its truth in evidence, to negative the malice and intent to defame.

After conviction for a libel against *Caleb Hayward*, by posting him in *State-street*, in *Boston*, thus: "*Caleb Hayward* is a liar, a scoundrel, a cheat, and a swindler. Don't pull this down;" his counsel, in *March*, 1808, moved for a new trial, because evidence was offered, and overruled by the judge at the trial, that in the course of dealing between *Hayward* and the defendant, *Hayward* had defrauded him, and, particularly, in a reference between them, by misrepresentations, and suppressing evidence, had recovered more than his due. After argument, the whole court, on the principles of the common law, decided that the evidence was properly overruled. (*Sed* see *Croswell's* case, 3 *Johns. Cases*, 337. and 2 *R. L.* of *N. Y.* 553.)

8. To read a scurrilous letter to others, impeaching the chastity of a woman, is evidence of the publication of a libel, and the repetition of matters contained in such letter, whether before or after action brought, may be given in evidence to show the malicious intent of the original publication, ii. 41

9. Malice is essential to support a criminal prosecution for a libel; and, although the implication of malice is, *prima facie*, supposed from the publication of libellous matter, yet the defendant may rebut such implication, by showing that such publication was not made maliciously, ii. 49. 171

10. How far a postscript explains matter alleged as libellous in a newspaper, ii. 49

11. Implication of malice rebutted by an editor of a newspaper, prosecuted for a libel on the clerk of the sessions, by

showing that the publication was furnished by the district attorney, ii. 90

12. The alleged libel was, that the clerk of the sessions had received, officially, *illegal fees*, and such as were not sanctioned by the *rules* and *practice* of the court; held, that to repel the charge, relating to the *rules* and *practice* of the court, he might produce his books; but that these should be only *prima facie* evidence of the facts they contained, but not to show the *legality* of the charges, *ib.*

13. Published by a painter, who, to revenge himself on one whose likeness he had taken, for disapproving of the execution of the work, painted the ears of an ass to it, and exposed it for sale at an auction, ii. 113

14. Not justified, in such case, by the painter proving that the one whose likeness he had taken, gave a written certificate, authorizing him to dispose of the picture as he pleased, *ib.*

15. Painter allowed to show that when he was painting the ass' ears, he said that he intended to transform the picture into a *Midas*, *ib.*

16. Malice may be rebutted in a publication, by producing such facts as show that the author believed the matter stated to be true, and published it under that belief, and with a view to the vindication of her character, though such matter be proved untrue, ii. 171. iii. 161

17. Insinuations published, conveying a serious charge against one, ought not to be founded on idle rumour, conjecture, or surmise, ii. 171

18. The *quo animo*, or *intent*, with which a publication is made, rather than its *truth* or *falsehood*, is the correct criterion by which the jury is to determine whether such publication is a libel: if no *malicious intent* existed, *no libel* was published, ii. 190

19. Established by publishing that one *made use of property known to be stolen*, though by this *property* was meant *a letter*, which, technically, is not the subject of larceny, iii. 27

20. In such case, the defendant will be allowed to show that he meant *a letter* surreptitiously obtained, *ib.*

21. Is a publication calculated to hold up another to public obloquy, contempt, and ridicule, iii. 27

22. *Declaration* set forth the matter in the text and *note* in a libel, in continuation—held no variance, iii. 97

23. *Declaration* set forth parts of a libel, omitting other parts, without mention—held no variance, *ib.*

24. When there is no justification, plaintiff is not precluded from proving the falsity of a libel, *ib.*

25. To engage a printer, even in a foreign state, to print a libel, is, technically, a sufficient publication to sustain an action, *ib.*

26. Where the parties in such action are both residents of a foreign state, and the libel is published in such state, the action will lie, *ib.*

27. To deliver to a wife, in confidence, a libel, is not a publication; but where she herself distributes some printed pamphlets containing a libel, to persons whose names have been indorsed thereon by the defendant, and delivers others with a similar indorsement to the plaintiff himself, who distributes them, the defendant was held responsible for the publication of the former, but not of the latter, *ib.*

28. Though the jury are not to give damages to a party libelled for any part containing libels against another, yet, in judging of the motives which actuated the writer, the jury may look at the whole publication, *ib.*

29. The office of an *innuendo* is to *explain*, not to *extend* or *enlarge* the obvious meaning and intent of a publication alleged to be a libel, iii. 161

30. The *gravamen* in an indictment for a libel was *swindling* against the state managers; the plain import of the publication, a *general* charge of fraud in lottery management, and *carelessness* on the part of the managers; held, that the *innuendos* could not extend the meaning of the publication, *touching the fraud*, to them, *ib.*

31. In such case, if fraud were committed by any one concerned in lottery management, or, if the circumstances were such as to induce a well-grounded belief of the fact, the publication is no libel, *ib.*

32. Should *fraud* be inferred, (that being

the charge in the alleged libel,) the defendant will be presumed to have made the publication with good motives, and for justifiable ends; if fraud be not inferred, he cannot be convicted unless actuated by malicious or mischievous motives, iii. 161

See ATTACHMENT AND CONTEMPT, 16. JURISDICTION, 4. JURY, 19.

Malicious Prosecution.

Poyllon's case, (2 *Caines' Rep.* 202.)

1. To warrant the granting of a copy of an indictment, whereon to ground an action for a malicious prosecution, the malice should appear from circumstances at the trial, declarations out of court, or a certificate from the Judge that he thinks it ought to be granted.

Motion for a copy of an indictment, whereon to ground an action for a malicious prosecution, was made to the Supreme Court, in *November*, 1804, on a certificate from the Judge, (not then on the bench,) before whom the case had been tried, that the acquittal was satisfactory to the court. The court decided that the malice ought to appear from circumstances on the trial, or from some declaration out of court; and the Judge should certify that he thinks it ought to be granted; and as to his not being on the bench, that is immaterial: he may certify *nunc pro tunc*. This having been done; the motion was granted.

2. To sustain an action for a malicious prosecution, it is unnecessary for the plaintiff to show *actual malice;* but should the jury, from all the facts and circumstances in the case, believe that the prosecution complained of could have resulted only from an intention to harass and oppress the plaintiff, by colour of law, and that the defendant had neither reasonable nor probable cause for such prosecution, *the law supplies malice*, in consequence of his act; and it will be their duty to find him guilty, iv. 92

Manslaughter.

Well's case, (*Coxe's Rep.* 424.)

1. To excuse a homicide on the ground of self-defence, it must clearly appear, that it was a necessary act, to avoid destruction or some severe calamity.

This, with other points, was determined in the Supreme Court of *New-Jersey*, in 1790, in this case, where there had been a conviction for manslaughter, in killing *James Cooper*. The facts in brief were, that the prisoner had taken a turkey from the house of the deceased, the wife consenting; and soon afterwards, saw the deceased at a blacksmith's shop, who abused him by calling him a thief. A fight ensued, which was provoked by the deceased, who struck the first below, and the parties were separated by the blacksmith.

The quarrel was renewed by aggravating language used by the deceased, who stepped up and struck the prisoner, who returned the blow and struck the deceased in the face. The prisoner fell against the *vice*, not being able to retreat further; and he then rose, took up a club, and struck the deceased a blow on the head, which fractured his skull terribly, and occasioned his death.

Excusable homicide, *se defendendo*, was urged in his defence.

The judge, on this point, instructed the jury, that whoever would shelter himself under this plea, must make it appear, that before the mortal stroke was given, he had declined any further combat; that he had retreated as far as was possible to do with safety, and that he killed his adversary through mere necessity, in order to avoid his own destruction.

The jury convicted the prisoner; and the court refused to award a new trial, for the misdirection of the judge.

R. M. Goodwin's case, (18 *Johns. Rep.* 187. See also, 5 *City-Hall Rec.* 11. 97. 181.—6 *Ib.* 9.)

The report in *Johnson* contains the law argument, on the question, whether the defendant, after the discharge of the jury in the Sessions, without his consent, could be again tried legally; and the opinion of the Supreme Court on that question. See 5 *City Hall Rec.* 97, for the discussion on that point; and for the *facts*, the other parts of the work above referred to.

2. Where it turns out, on trial, that the killing took place out of the jurisdiction of the court, the prisoner will be detained till he can be recognised to appear in the Oyer and Terminer where the offence occurred, i. 181

3. Where, after a struggle ceases, between two combatants, one of them again strikes, with his fist, a mortal blow, it was held that he was guilty, iii. 145
4. Declarations by the wounded party, who survived several days, made at or about the time of the wound, may be received as part of the *res gestæ*, and need not be considered made *in extremis*, iv. 109
5. May be committed in a fit of anger or intoxication, by throwing a teapot, *ib.*
6. Where two agree to fight, and during the affray death ensues, though not intended, the survivor is guilty of manslaughter, v. 52. 103. 181. vi. 9. 59
7. It is not an assault to point a cane to one in derision in the street, for the purpose of insulting him, but without an intention of striking him, vi. 9
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9. Where one provoked an affray, and on receiving a blow with the fist used a dagger, and death ensued, it was held manslaughter, *ib.*
10. Calling one a *scoundrel* and *coward*, in the street, amounts to a challenge to fight, *ib.*
11. It is immaterial, as regards this offence, which struck first, *ib.*
12. Death shall be assigned to blows given, as the adequate cause, though *external appearances* do not indicate that the blows occasioned the death, vi. 59

Manumission.

1. A writing, given by the master to his slave, giving him liberty to work for himself, if he would pay him $64 a year, for four years, operates as a conditional manumission; and, if he pay the money within the time, he is free, ii. 1
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3. The object of societies, for that purpose, in general, *ib.*

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1. A promise of marriage may be inferred from circumstances, and need not be proved by positive testimony, iii. 193
2. How far the conduct of a woman, plaintiff, towards her suitor, the defendant, will affect the damages, in an action for breach of promise of marriage, *ib.*
3. On a treaty of marriage between a man and woman, she paid him a sum of money, and he agreed to marry her, and afterwards accompanied her from *New-York* to *Harlæm*, to be married; but, on their arrival there, he told her that he was engaged to marry another woman, in *Ireland*, and that in about five weeks the promise would be out, when he would marry the plaintiff, and requested that it should be given out that the marriage had been consummated. She agreed to this arrangement; and, without being married, they lived together as man and wife, but he afterwards refused to marry her. It was held, that by her agreement she waived her right to a recovery of damages for the breach of such promise, but that she was entitled to recover the money advanced to him, iv. 63
4. Evidence of the declarations of the prisoner, that he called a woman, whom he introduces as a witness in his behalf, his wife, and that he lived with her as such, will be sufficient to disqualify her as such witness; but a written instrument between a man and woman, by which they agree to live together as man and wife, as long as they can agree, does not constitute a marriage, and cohabitation under such agreement is abominable, v. 141

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Misdemeanor.

Teischer's case, (1 *Dall. Rep.* 338.)

1. An indictment lies for "maliciously, wilfully, and wickedly killing a horse," although not charged to have been done *secretly.*

A motion in arrest of judgment was made and argued in this case, in the Supreme Court of *Pennsylvania*, in *July*, 1788, on the ground that the indictment, which charged the defendant with "maliciously, wilfully, and wickedly killing a horse," and upon which he had been convicted, was not supportable at common law, because the act was but a trespass, and it was not laid to have been done *secretly.*

Sed per M'Kean, Ch. J.—Whatever amounts to a *public wrong*, may be made the subject of an indictment. The poisoning of chickens, cheating with false dice, fraudulently tearing a promissory note, have heretofore been indicted here; and 12 *Mod. Rep.* 337, furnishes an indictment for killing a dog, an animal of far less value than a horse. Motion denied.

Taylor's case, (5 *Binn. Rep.* 277.)

2. It is a misdemeanor at common law, for one to break into a house, *secretly*, at night, and

wilfully and turbulently to make a great noise, and greatly misbehave himself, and so alarm and frighten the mistress of the house, that she miscarried.

Error to the *Franklin* Quarter Sessions, (*Pennsylvania*,) from the Supreme Court. The defendant was indicted and convicted at the Quarter Sessions, for a misdemeanor. The amount of the indictment was, that, on the 24th *August*, 1809, at ten o'clock at night, with force and arms, &c. the dwelling-house of J. S.. the defendant, unlawfully, maliciously, and *secretly*, did break and enter, with intent to disturb the peace of the state; and, being in the house, unlawfully, vehemently, and turbulently *did make a great noise*, in disturbance of the peace, &c., and greatly misbehaved himself in said house, and E. S., the wife of J. S., did greatly frighten and alarm, by means of which fright and alarm, she, the said E. S., being then and there pregnant, did, on the 7th of *September*, in the year aforesaid, at, &c., miscarry; and other wrongs, &c., *contra pacem*.

The Quarter Sessions, after conviction, arrested the judgment, upon the ground that the offence was not indictable. The question was argued in the Supreme Court, in *October*, 1812, when it was decided that the conviction was right; and the court directed the record to be remitted, and that the Quarter Sessions give judgment.

Tilghman, Ch. J., in his opinion, cited the case of *Teischer*, (1 *Dall. Rep.* 338.) and said that he did not find any precise line by which indictments for malicious mischief are separated from actions of trespass. It is not necessary that there should be actual force or violence to constitute an indictable offence. Acts injurious to private persons, which tend to excite violent resentment, and produce fighting, are indictable. Such are challenges to fight a duel, libels upon the living, and even upon the dead; for these offences are calculated to produce acts of revenge, and tend to breaches of the peace. (See *Sayer's Rep.* 161.)

Addison's case, (4 *Dall. Rep.* 225.)

3. Though it is indecent and improper for a Judge, after concluding his charge to a grand jury, wilfully to prevent one of his brethren on the bench from expressing his sentiments to the grand jury, it is not an indictable offence.

A motion was made by the Attorney General, in the Supreme Court of *Pennsylvania*, in 1801, for a rule to show cause why an information should not be granted against the defendant, President of the court of Common Pleas, &c., on the ground, (as disclosed by affidavit,) that after he had concluded his charge to the grand jury, he wilfully prevented Judge *Lucas* from delivering his sentiments to the grand jury.

The court refused the motion, being unanimously of opinion, that an information would not lie, because the offence, however indecent and improper, was not indictable.

Hoxey's case, (16 *Mass. Rep.* 384.)

4. An indictment lies at common law, for disorderly behaviour at town meetings.

An indictment concluding *contra formam statuti* may be maintained, if the facts charged amount to an offence at common law and are not within the purview of any statute.

The defendant was indicted under the *Massachusetts* act of 1785, c. 75, sect. 6, for disorderly conduct at the *Williamstown* town meeting; the indictment stating that, while the moderator was presiding, and taking votes, the defendant, intending to prevent the choice of selectmen, and to interrupt the freedom of election, unlawfully, and disorderly, did declare, that the old selectmen should not be chosen, and attempted, repeatedly, to take the votes from the box, &c. *contra formam statuti*. He pleaded guilty, and moved in arrest of judgment, on the ground that the indictment contained no offence against the act nor at common law.

It was the opinion of the court, that the offence charged was not within the act, for it is not alleged, according to the provision of the act, that he was ordered by the moderator to withdraw. But they held, that they had no doubt but that the indictment was supportable at common law. His conduct tended to a breach of the peace, and to the prevention of elections, necessary to the orderly government of the town.

Motion overruled.

Silsbee's case, (9 *Mass. Rep.* 417.)

5. It is a misdemeanor at common law for a citizen, who is a legal voter at a town meeting, to give in more than one vote for a municipal officer at one time of balloting.

Motion was made in arrest of judgment,

in *November*, 1812, after conviction on an indictment, at common law, charging the defendant for that he being a legal voter, at the town meeting of *Salem*, for the choice of town officers, did wilfully, &c. give in more than one vote, for the choice of selectmen, at one time of balloting: to the great destruction of the freedom of elections, to the prejudice of other qualified voters, *et contra pacem.* It was urged, that this was no offence at common law. *Sed per cur:* The offence described in the indictment is a misdemeanor. It is a general principle, that where a statute gives a privilege which one wilfully violates, the common law will punish such violation. Defendant was fined $10 and costs.

Bangs' case, (9 *Mass. Rep.* 387.)

6. An indictment for administering a potion, with intent to procure an abortion, must contain an allegation that an abortion ensued, and that the woman was quick with child.

In *October*, 1812, after a conviction of the defendant for assaulting and beating *Lucy Holman*, and administering to her a certain dangerous and deleterious draught, or potion, to procure an abortion, a motion was made in arrest of judgment, on the ground that no abortion is alleged to have taken place, nor that she was quick with child: *Et per tot. cur:* This was necessary. There can be no sentence on the verdict.

Warren's case, (6 *Mass. Rep.* 72.)

7. To obtain goods by lying, without using false weights and measures, or tokens, is a civil injury, and not a public offence.

After conviction, on an indictment at common law, alleging that the defendant, intending to cheat *B. Adams*, falsely pretended and affirmed to him, that his, the defendant's, name was *Waterman;* that he lived at *Salem*, and kept a grocery there; and that he wanted to purchase fifty pair of shoes of *Adams*, on credit, giving his note as security therefor; and that he did so purchase the shoes on credit, giving the note subscribed with the name of *Waterman;*—the defendant moved in arrest of judgment; and, in *November*, 1809, the court held, that this was but a naked lie; and, as no false weights or measures, or tokens, were used, and there was no conspiracy, the judgment must be arrested. (*Rex* v. *Lara.* 6 *Durn.* and *East's Rep.* 565.)

Ryan's case, (5 *Mass. Rep.* 90.)

8. It is no sufficient exception to an indictment for an offence to which the law annexes a fine for the use of the town where the offence is committed, that the foreman of the grand jury, who found the indictment, is a taxable inhabitant of such town.

After conviction in the municipal court of *Boston*, an appeal was entered to the supreme judicial court, in *March*, 1809, on the ground, that *William Stephenson*, the foreman of the grand jury, who found the indictment, (which was for keeping a billiard table, contrary to the act of 1798, c. 20, sect. 2., and in which the penalty enured to that town,) was, at the time of the finding, a taxable inhabitant of *Boston:* and it was urged, that it was against the principles of natural justice, that one should be judge in his own cause, and that *Stephenson* was such.

But after argument, the court decided, that as the municipal court, by statute, has jurisdiction of the offence, and must indict by the inhabitants of *Boston*, if the objection should prevail, the court is ousted of its jurisdiction; and though there might be some degree of interest, yet the legislature has virtually provided that such a remote corporate interest shall be no legal objection.

Symonds' case, (2 *Mass. Rep.* 163.)

9. A charge for behaving rudely in a meeting house, and for interrupting public worship, cannot be joined in one count.

Appeal from the Sessions to the Supreme Court, in *October*, 1806. The defendant was convicted on an indictment containing one count, for behaving indecently and rudely in a church; and for wilfully interrupting the people assembled there on the Lord's day.

The 7th section of the act (*March* 8, 1792,) prohibits any one from behaving rudely or indecently in a church, under a penalty of not more than *forty*, nor less than *five* shillings; and the 8th section prohibits the wilful interruption or disturbance of any assembly of people met for religious worship, under a penalty of not more than *ten pounds*, nor less than *twenty shillings.*

The court arrested the judgment, on the ground that the indictment contained, *in one count*, two distinct offences, described

in two different sections of the act, providing distinct and different fines.

Mycall's case, (2 *Mass. Rep.* 136.)

10. An indictment against a justice of the peace for altering a writ, issued by himself, after service and before its return, not charging the offence as *forgery*, cannot be supported.

Motion in arrest of judgment, in *September*, 1806. The defendant was convicted on an indictment at common law, stating, that he, as a justice, issued an *attachment*, directed to the sheriff of *Essex*, and to the constable of *Harvard, in the same county;* and that the writ having been served by that constable, and returned to the defendant, he unlawfully erased the word *Essex*, and inserted the word *Worcester*, with intent to injure, &c. His counsel was about urging to the court, that the indictment was not supported, because it contained no technical description of forgery; but he was stopped by the court, who, for that reason, arrested the judgment.

Leach et al. case, (1 *Mass. Rep.* 58.)

11. Ancient English statutes, made in amendment of the common law, are parts of the common law here.

The defendants were indicted in the *Sessions* in *Massachusetts*, at *common law*, for poisoning a cow; and on an appeal to the *Supreme Court*, in *September*, 1804, on the ground that the Sessions had not jurisdiction of a common law offence, it was held that the statutes of 1 *Ed.* 3. c. 16, and 34 *Ed.* 3. c. 1, respecting the jurisdiction and power of justices of the peace, had been adopted, used and approved *here*, and are to be considered part of the common law. And *per Dana*, Chief Justice: Generally, when an *English statute* has been made in amendment of the common law of England, it is *here* to be considered as part of *our* common law. (*See* 2 *East's Rep.* 5.) Motion overruled.

Sharpless et al. case, (2 *Serj.* and *Rawle's Rep.* 91.)

12. An offence, which in its nature and by its example, tends to the corruption of morals, as the *exhibition of an obscene picture*, is indictable at common law.

13. In such case, it need not be averred that the exhibition was *public;* if it be stated that the picture was shown to sundry persons for money, it is a sufficient averment of *publication*.

14. Nor is it necessary, that the postures and attitudes of the figures should be minutely described; nor is it necessary to lay the house, in which the picture is exhibited, to be a *nuisance*.

On *certiorari* to the Mayor's Court of *Philadelphia*, in *December*, 1815: it appeared from the return, that the defendants were indicted for a misdemeanor at common law, for that they, contriving and intending the morals, as well of youth as of divers other citizens of, &c. to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires, on, &c. at, &c. in a *certain house*, unlawfully, &c. *did exhibit and show for money, to persons unknown, a certain lewd, wicked, scandalous, infamous and obscene painting, representing a man in an obscene, impudent and indecent posture with a woman;* to the manifest corruption of youth, &c. *et contra pacem.*

The defendants suffered a verdict to pass; and on removing the case, moved the court in arrest of judgment for three reasons:

(1.) The matter laid in the indictment, is not an indictable offence.

(2.) It does not charge any thing to have been committed or omitted, contrary to the common or statute law.

(3.) It purports to be an indictment at common law, for the commission of an immoral act, yet, it does not allege, or show, that the act was done *publicly*. And it was argued, that there was not a sufficient description of the substance, nature, and manner of the offence meant to be charged; and that it was not laid as a common nuisance.

In the discussion, which was very ample, the principal authorities on the subject were cited, and commented on on both sides. On the part of the defendants, the counsel cited 4 *Black. Com.* 64. 2 *Stra.* 788. *Popham*, 208. *Sir Charles Sedley's* case, for exhibiting himself naked on a balcony in *London*, 1 *Sid.* 168. *S. C. Latch.* 173. *Fortesq.* 98. *Keelyng*, 163. 3 *Burr.* 1645. 1 *Salk.* 382. 1 *Wils.* 301. 2 *Burr.* 1125. 12 *Mod.* 413. 1 *Mass. Rep.* 8. 2 *Stra.* 1127. 2 *T. R.* 581. 1 *Johns.* 78. *Trem. P. C.* 209. *Comb.* 303. 1 *Day's Rep.* 103. 4 *Burr.* 2527. And that the indictment should conclude to the *common nuisance* of all the citizens, the precedents were referred to: *Stubbs C. C. C.* 478—503. 5 *Bac. Ab.* 151. 1 *Saund.*

Rep. 135. On the other side, the application of the principal cases cited, to the present one, was denied; and it was urged, that it was unnecessary to state in the indictment the *postures* of the figures in the picture with more particularity; *that* was matter of evidence; that the purity of records should be preserved; and that there was no necessity that the picture should be stated to have been exhibited *publicly*, or that it was a *common nuisance:* it was sufficient to show that it was calculated to corrupt public morals.

Et per cur.: The indictment is good at common law. Actions of public indecency have been always held indictable, because they tend to corrupt the public morals. Such was the case of Sir *Charles Sedley*, cited on argument, that of *Curl*, (2 *Stra.* 792,) Sir *Francis Blake Delaval*, (3 *Burr.* 1438) which was a conspiracy for seducing a girl under twenty-one years of age, and placing her in the situation of a kept mistress, under the pretence of binding her as an apprentice to her keeper; and that of *Dingley* (*Trem. Pl.* 213) for seducing a married woman to elope from her husband. In the present case, the defendants exhibited to sundry persons, *for money*, a *lewd*, *scandalous* and *obscene painting*. That in the eye of the law is a sufficient *publication*.

There was no necessity here, that the indictment should describe minutely the attitude and postures of the figures. Some respect should be paid to the chastity of our records. Whether the picture was indecent, the jury could judge from the *evidence*, or, if necessary, from *inspection*. Nor was it necessary that the act should be laid as a *common nuisance;* it is sufficient that it was calculated to corrupt the public morals. Motion denied.

15. Indecency towards infant females, by a schoolmaster, ii. 147, 148
16. Punishment for the offence inflicted, ii. 149
17. An intelligence-office keeper, who recommends a young female stranger to a house of ill fame, knowing it to be such, is indictable for a misdemeanor at common law, though such stranger be herself a prostitute, iii. 49
18. *Quere:* Whether to vend Arsenic, or other poisonous drugs, indiscriminately, without making diligent inquiry, and ascertaining satisfactorily to what purpose they are to be applied, is not a misdemeanor at common law, i. 185
19. The Court of General Sessions, in and for the City and County of New-York, have a right, in a case of misdemeanor, to grant a new trial on the merits, iii. 13
20. To cast spirits of vitriol, aqua fortis, or any other powerful acid substance, on the person or clothes of another, wantonly and maliciously, is, *at least*, *an infamous crime*, ii. No. 2. p. 5

IN CRUELTY TO BEASTS.

21. To treat a dumb beast, under the care of a man, with cruelty, is a misdemeanor at common law; but where a cartman struck his horse but a single blow with a club, which deprived the animal of life, under circumstances which evinced, that the killing was not the result of deliberation, it was held that an indictment for cruelly beating the horse was not maintained, iii. 191
22. It is a misdemeanor to tie the tongue of a calf, thereby to prevent its sucking a cow, for the purpose of deceiving in the sale of such beasts, vi. 62
23. An indictment at common law, cannot be maintained for a mere trespass, ii. No. 2. p. 6
24. Arguments for and against such prosecution, *ib.* 7. n.
25. To break the seal and open a letter, containing the secrets or private business of another, is a misdemeanor at common law, iii. 13. 61
26. But to publish the contents of such a letter, which may innocently come into the possession of the publisher opened, is not a public offence, iii. 13
27. By the 15th section of the statute of the United States, concerning "Post-offices and Post-roads," (1 *Graydon's Dig.* p. 341.) it is enacted, that "if any person shall take any letter or packet not containing any article of value, or evidence thereof, out of a post-office, or shall open any letter or packet which shall have been in a post-office, or in the custody of a mail carrier, before it shall have been delivered to the person to whom it is directed, with design to obstruct the correspondence, or to pry

into another's business or secrets; or shall secrete, embezzle, or destroy any such mail letter or packet; such offender, upon conviction, shall pay for every such offence," &c. It was held that the jurisdiction of the court of General Sessions, over an offence of this description, was not ousted by this act; such offence being a misdemeanor at common law, iii. 61

See CHALLENGE TO FIGHT, 3, 4. COINING, 1, 2. COMPOUNDING, 2. FORGERY AND COUNTERFEITING, 67. GAOL, 1. SCOLD.

Murder.

Honeyman's case, (2 *Dall. Rep.* 228.)

1. The omission of the technical epithets, "*wilfully, feloniously,*" &c. immediately preceding the acts employed to kill, in an indictment for murder, is fatal.

Error from *Alleghany* Oyer and Terminer to the Supreme Court of *Pennsylvania*, in 1795.

The indictment, charging the prisoner with the murder of *Benjamin Askins*, stated that the prisoner, *feloniously*, *wilfully*, and of his malice aforethought, *made an assault*, and with both hands and feet, the prisoner, in and upon the body of *Askins*, did strike, kick, &c. omitting the appropriate epithets of *intent* immediately preceding the words "did strike," &c.

On an objection taken to this omission, the *Attorney General* was convinced that it was fatal, and the court reversed the judgment.

Mulatto Bob's case, (4 *Dall. Rep.* 144.)

2. It is murder for one, after an affray is over, in which he has been engaged, to arm himself with a deadly weapon, go into a crowd, and inflict a blow which kills.

The facts were, that at a negro wedding a quarrel and fight ensued, in which *Bob* was engaged till he was beaten, and cried "enough." He then armed himself with a club, which he was advised not to use; but he entered the crowd with it, and after staying there about ten minutes, went to a wood-pile and took an axe. He was also advised not to return with it to the crowd, but he said he would, and striking the axe with great passion into the ground, swore "that he would split down any fellows that were saucy." He went among the crowd—there was a struggle for the axe—*Bob* struck the deceased with it on the head, and as he was attempting to rise, struck the second blow, which penetrated to the brain, and in three days he died. The case was tried in the Supreme Court of *Pennsylvania*, in 1795, when *M'Kean*, C. J. charged the jury, that this was murder in the first degree, and they convicted him.

Bowen's case, (13 *Mass. Rep.* 356.)

3. If one counsel another to commit suicide, and the other, by reason of the advice, kills himself, the adviser is guilty of murder as a principal.

The indictment was for the murder of *Jonathan Jewett*, whom the prisoner, as was alleged, advised to hang himself, which he did, and in a separate count he was charged with hanging *Jewett*.

Facts: the deceased, having been convicted of the murder of his father, and sentenced to death, was confined in prison adjacent to the room of the prisoner, who repeatedly advised and urged him to destroy himself, and thus disappoint the sheriff, and those who might assemble to see him executed; and in the night before the day fixed for his execution, he hung himself.

On the trial of the prisoner, the Attorney General urged, on the authority of a case in *Kelyng's Reports*, 52. and 4 *Black. Com.* 186. that the prisoner was guilty of murder as principal; and Chief Justice *Parker*, in his charge to the jury, advised them that if they believed, from the facts, that *Jewett*, having previously determined in his own mind to hang himself, and did so uninfluenced by the advice of the prisoner, then they ought to acquit him; but should they believe that the prisoner encouraged and kept alive motives previously existing in *Jewett's* mind, and suggested others to augment their influence, and in any manner was instrumental in his death, it would be their duty to convict him. He was acquitted.

Drew and *Quinby's* case, (4 *Mass. Rep.* 391.)

4. To strike a blow with a *deadly weapon*, is murder, though inflicted on one who attempts, without legal authority, to arrest a

companion of the prisoner, while they are peaceably at work together.

The prisoners, in *May*, 1808, were indicted for the wilful murder of *Ebenezer Parker*, and the material facts appeared to be, that *Parker*, a deputy sheriff, living several miles from *Quinby*, served an execution against his body on him, in favour of one *Gould*, and without his paying the money, delivered him to one *Richard King* for safe keeping. *King*, without the knowledge of *Parker*, suffered *Quinby* to go at large, who promised that he would be ready to pay *Parker* when he should call. In about a fortnight *Parker* came, and *Quinby* could not be found. The prisoners were blacksmiths, in the employ of one *Daniel Conant*. *Parker* again came to arrest *Quinby*, if he would not satisfy the execution, and this *Quinby* knew. The prisoners were both in the blacksmith's shop, which they fastened, to prevent entrance from without. *Parker* sent one *Babb* there to tell them he was coming, and advise *Quinby* to settle, and *Babb* did so, and told them that *Conant* was ready to settle the execution if *Quinby* was willing; but *Quinby* refused. *Parker*, with *King* and *Cox* as his assistants, came to the shop and knocked. *Drew* was drawing nails from a rod, and *Quinby* blowing the bellows, while one hand was resting on a bludgeon of hard wood, four or five feet long, and two inches through. *Drew* inquired, "Who is there?" "*Parker*," was the answer by him, and he then asked for admission. *Drew* asked him if he was well? "Yes," said *Parker*. "Then I advise you to stay where you are," said *Drew*. *Parker* said, "I do not want you; I want *Quinby*, who is my prisoner, and I will have him." *Parker* then pulled open the door. *Drew* threw down the nail-rod, and took up the sledge, and running out of the door in a great passion, said, "What are you breaking open my shop for? Stand by, or I will throw the sledge through you." He then struck with the sledge at *Parker*, who dodged it, and then threw it at *King*, who retreated, and it glanced against his breast. When *Drew* left the shop, *Quinby* threw down the bludgeon he had rested his hand on, towards the door; and after *Drew* had thrown the sledge at *King*, he returned to the door, and took up the bludgeon, and holding it in both hands, struck at *Parker* three times with great violence. The first blow struck the door, the second the head of *Parker*, which inflicted the mortal wound, fracturing the skull, and as he was falling, the third blow fell on his head and shoulders. He died in seven days thereafter.

The prisoners were tried separately, and after the above evidence was given, in the trial of *Drew*, it was urged by his counsel, that his offence was manslaughter, not murder. Chief Justice *Parsons*, in his charge to the jury, instructed them, that *Parker*, having arrested *Quinby* and suffered him to go at large, could not legally arrest him again on the same execution; and his honour left it as a question of fact for the jury, whether the *bludgeon* was or was not a *deadly weapon*, which would necessarily kill, or do great bodily harm. If it was, then the provocation arising from the trespass committed by the deceased, in breaking open the shop, was not an excuse sufficient to reduce so barbarous an act below the crime of murder. For where the trespass is barely against the *property* of another, and not his dwelling-house, it is not a provocation sufficient to warrant the owner in using a deadly weapon; and if he do, and death ensue, it will be murder. The prisoner was convicted, and afterwards received sentence of *death*: and *Quinby* being tried on the same state of facts, as having aided and assisted *Drew*, the chief justice left it in charge to the jury, that if they believed that the prisoner threw the *bludgeon* towards the door with intent to furnish *Drew* with a deadly weapon, it would be their duty to convict him. *Quinby* was acquitted. (See *Randall's* case, 5 vol. *City Hall Rec.* 141.)

Thompson's case, (6 *Mass. Rep.* 134.)

5. If one, assuming the character of a physician, through ignorance administer medicine to his patient with an honest intention and expectation of a cure, but which causes the death of the patient, he is not guilty of a felonious homicide.

The prisoner was indicted and tried in *November*, 1809, before the Chief Justice and Judges *Sewall* and *Parker*, for the wilful murder of *Ezra Lovett*, by administering to him a poison called *lobelia*.

The facts were voluminous, but were briefly these: the prisoner came into the neighbourhood of *Lovett*, announced himself as a physician, pretending to cure all fevers, and decried all other physicians, calling one of his medicines *coffee*, another, *well-my-gristle*, and a third, *ram-cats*. *Lovett* had been confined by a cold, and sent for him, on *Monday*, the 2d of *January*. He came, and ordered a large fire to heat the room, and placed the bare feet of *Lovett* on a stove of hot coals, wrapping him in a thick blanket, and gave him a powder in water, which puked him. Three minutes after, he repeated the dose, which operated violently. These doses were given in the space of half an hour, the patient drinking copiously of the prisoner's *warm coffee*. *Lovett* was put to bed in a profuse sweat. Next day he left his bed, complaining only of debility, and in the afternoon the prisoner came, and administered two more emetics, in succession, which puked him, and he drank of *coffee*, as before, and was much distressed. The next morning the prisoner gave him two more emetics, with draughts of *coffee*. On *Thursday* morning *Lovett* seemed comfortable, but in the afternoon the prisoner sweated him again, placing him over an iron pan, heated by hot stones thrown in vinegar, and covering him with blankets. *Friday* and *Saturday* no visit of the prisoner took place. On *Sunday* (the debility increasing) he was sent for, and in the afternoon administered his emetics and *coffee*, which caused much distress. The weakness increased, and on *Sunday* evening the prisoner gave another puke, and in about twenty minutes another, and these did not operate, when the prisoner gave him pearlash and water. *Lovett* was much distressed, and said *he was dying*. At ten in the evening he lost his reason, and fell into convulsions, when the prisoner got down his throat one or two more emetics. Next morning the regular physician was called, but *Lovett* was so far exhausted that no relief would avail, and on *Thursday* he expired.

It appeared that this *coffee* was a decoction of *marsh rosemary*, mixed with the bark of *bayberry bush*, and this was not supposed to have injured the deceased; but the powder which the prisoner said he chiefly relied on in his practice, (the *emetic*,) was the plant commonly called *Indian Tobacco*, (the *lobelia inflata* of *Linnæus*, thus described: class *pentandria*; order *monogynia*; capsule two or three celled; corol. irregular, cloven; *antheræ* united; stigma simple; species, inflata; stem erect; leaves ovate, slightly serrate, larger than the peduncle; capsules inflated,) and this plant was proved to be indigenous, and celebrated, in that part of the country, for its emetic qualities; that it was gathered and preserved, and the roots, stalks, and leaves, were administered by some families, and that four grains of the powder was a powerful puke. Finally, it was shown that this plant was beneficial, and had been administered for the *asthma*; and it further appeared that the prisoner had *considerable business*, and that he had not before experienced any fatal accidents among his patients.

The court was so well satisfied that the evidence did not support the charge, that the prisoner was not put upon his defence; and the chief justice, in his charge to the jury, instructed them, that there was no evidence either of *express* or *implied malice*, or that the prisoner intended any harm to the deceased; on the contrary, it was his intention to cure him; therefore, he was not guilty of *murder*. Nor was he guilty of manslaughter, for he was not engaged in an unlawful act. There is no law which prohibits any man from prescribing for a sick person, with his consent, if he intends to cure him by his prescription. The prisoner's ignorance was clearly apparent, but this would not support the charge. The law thus stated was conformable not only to the general principles which governed cases of felonious homicide, but also to the opinion of the learned and excellent Lord Chief Justice *Hale*. He expressly states, that if a physician, whether licensed or not, gives a person a potion, without any intent of doing hurt, but with intent to cure, or prevent a disease, and contrary to expectation it kills him, he is not guilty of murder or manslaughter. (1 *H. H. P.* c. 429.) Though it was to be lamented that people put confidence in these itinerant quacks, and trust their lives to men without knowledge or experience, there

is no remedy by criminal prosecution, where the quack, however ignorant and presumptuous, prescribes with honest intentions. The prisoner was acquitted.

White's case, (6 *Binn. Rep.* 179.)

6. An indictment, charging that the prisoner, with a certain stone, which he held, in and upon the right side of the head of the deceased, feloniously, &c., did *cast* and *throw*; and, *with* the stone aforesaid, the deceased, in and upon the right side of the head, feloniously, &c., *did strike*, sufficiently charges, that the prisoner *threw* the stone, and *struck* the deceased.
7. A precept to the Sheriff, commanding him to cause to come, &c. "twenty-four *good and lawful* men of the body of the county of C. aforesaid, then and there to inquire, present, do and perform such things as on behalf of the state shall be enjoined on them, *and also* a competent number of *sober and judicious persons*, and none other, as jurors for the trial of all issues," &c., contains no command to convene the *petit jurors* from the body of the county of C.; and if it does not appear, by the return or the panel, that they came from the body of that county, the error is fatal.

Error from the Supreme Court in *Pennsylvania* to the Oyer and Terminer of *Cumberland* county, to bring up the record and judgment.

The prisoner was convicted on an indictment for the murder of *Samuel Sampson*, stating, in substance, that, on the 23d of *July*, 1812, the prisoner, with a certain stone, which he in his right hand had and held, in and upon the right side of the head, near the right temple of S., then and there, feloniously, &c., did *cast* and *throw*; and that he, the prisoner, with the stone aforesaid, so *cast* and *thrown*, the aforesaid S., in and upon the right side of his head, near the temple of S., then and there, feloniously, &c., *did strike*, penetrate and wound, &c.

The precept to summon the grand and petit jurors, after commanding the sheriff to cause to come before the court in *Cumberland* county, twenty-four *good and lawful men* of the county of *Cumberland* aforesaid, then and there to inquire, and present, &c., proceeds, "*and also* a competent number of *sober and judicious persons*, as jurors for the trial of issues, &c.;" and in no other way was he commanded to summon the petit jurors from *Cumberland* county; and his return did not mention the county from which they came.

The principal objections taken to the record were—1. That the indictment was absurd, as it charged the offence to consist in throwing *with* a stone, &c., and did not lay the charge of *striking* positively and certainly.—2. That the Sheriff was not commanded to cause *good and lawful men* of his bailiwick to be summoned as petit jurors, but merely *sober and judicious persons*; and it did not appear by the record, that they were taken from his bailiwick.

In *October*, 1813, *Tilghman*, Ch. J., (*Yeates*, J. dissenting,) delivered the opinion of the court, that, with regard to the first point, though the action of *White* is not as well described in the indictment as might have been, yet taking the whole of it together, it sufficiently appears that he threw a stone, with which he struck *Sampson*, and thus killed him. But, with regard to the second point, his opinion was, that the description of the two sets of jurors, in the precept, was each complete and independent of the other; and the use of the copulatives "*and also*," was to show that the sheriff was commanded to cause to come, &c. both one jury and the other. If he were allowed to conjecture, his honour said, he should have no doubt but that the whole jury was of *Cumberland*. Were it a *civil* case, he would try hard to get over the objection; *but where life was at stake, he dared not to endeavour to be ingenious.* Judgment was reversed. *Yeates*, J., was of opinion for its affirmance.

N. B. In the case of *Eaton*, who was convicted of murder, (6 *Binn. Rep.* 447.) it was decided, on a writ of error to the *York* Oyer and Terminer, that if a precept goes to the Sheriff and County Commissioners *to draw* a jury for that court, and it be not returned so that it shall appear, in some part of the jury process, that the jurors have been legally drawn, it is error; and, that being the defect in the process in this case, the Supreme Court reversed the judgment.

8. On the traverse of an indictment for this offence, the public prosecutor cannot show that a scar, near the mortal wound, was occasioned by a stab made on the deceased by the prisoner, unless he can also connect the former with the latter occasion of the wound, i. 99
9. A quarrel at a remote period cannot be shown, *ib.*
10. Where a doubt exists relative to the prisoner's guilt, jury ought to acquit, *ib.*

11. Why a wound, inflicted in the left ventricle of the heart, occasions sudden death, i. 102. n.
12. Charges to the jury in cases of murder, i. 103. 189. ii. 83. iii. 48. v. 160
13. To constitute an intent to commit murder, express malice need not be shown, i. 117
14. One, not a Friend, called as a juror, and declaring that he never would find a verdict of guilty, where death would result, held incompetent, on a challenge by the public prosecutor, i. 185
15. Where *insanity* is set up in defence, and the jury doubt on this point, they ought to convict, *ib.*
16. It is murder, for a man, with malice aforethought, to discharge a loaded musket at another, by means of which death ensues, though the deceased was, at the time, committing a trespass on the prisoner, ii. 77
17. Where, however, the deceased, a neighbour, was committing a trespass on the prisoner's land, and there was some reason for believing that the latter, in a violent struggle with the other, was actuated rather by a momentary frenzy, than malice aforethought, the jury acquitted him, *ib.*
18. On the traverse of an indictment for the murder of a wife, where the evidence is merely circumstantial, and from an impure source, it is the safer course to acquit, iii. 45

MURDERING AN INFANT, OR INFANTICIDE.

19. The fact of concealment, soon after the birth, is not, in this country, as in *England*, sufficient, in a prosecution for this offence: it must be proved, positively, *that the child was born alive*, iii. 45
20. Not established sufficiently to produce a conviction, though the circumstances were overwhelming, v. 70

See CONFESSION, 1, 2. INSANITY, 1. JURY, 10. 13. 17. PLEADING IN A CAPITAL CASE. SLAVE, 2. VENIRE, 2.

New Trial.

Chenango Sessions' case, (1 *Johns. Cases*, 179.)

1. The Sessions cannot grant a new trial, after a verdict on the merits, in a case of felony.

In the Supreme Court, in *October*, 1799, on a rule to show cause why a *mandamus* should not issue against the Justices of *Chenango*, commanding them to proceed to judgment against one *Noah Taylor*, convicted before them of a *felony*; they showed cause that they had awarded a new trial on the merits, the conviction, in their opinion, being against evidence.

After argument, the Court decided that the Sessions, being a court of inferior jurisdiction, could not grant a new trial, in such a case, after a verdict on the merits; and, from considerations of expediency, that it ought not to be invested with that power; and the rule for a *mandamus* was made absolute.

2. A new trial will be granted where a paper is taken out by the jury, without consent, though such paper is not referred to by them, i. 147
3. Refused, in a case where the plaintiff, a young lady, had recovered $3,500 against a rich man for falsely accusing her of perjury, i. 154
4. Granted in a case of grand larceny, where the jury did not agree, ii. 33
5. Authorities on that subject, collected, ii. 35. n.
6. Should the jurors, in a case of grand larceny, not be able to agree, and after staying out a reasonable time, and returning into court, are discharged, the prisoner may be tried again, for the same offence, by another jury, ii. 33
7. Refused in a felony, on the ground of newly discovered evidence, ii. 73
8. On the merits, in a misdemeanor, can be granted by the *New-York* Sessions, iii. 13
9. Refused, on the ground that impure testimony was admitted, iii. 96
10. Cannot be granted on the merits, in felony, iv. 39
11. An indictment contained five counts, three of which were for intercepting, opening, and reading a private letter, containing the secrets of another, sealed and directed to an individual, and for causing and procuring the same lette to be intercepted, opened and read: the fourth count, was for obtaining and getting into possession such letter, and *publishing its contents*, and the fifth for thus obtaining and getting in possession the same letter and *publishing*

it in a public newspaper, with strictures and comments. On the trial, the evidence on the part of the prosecution did not support the charge in the three first counts, which alone contained an indictable offence, and so expressed by the court in their charge to the jury, who, nevertheless, found a general verdict against the defendant. On an application to the court to grant a new trial, on the ground that such *verdict was contrary to law and evidence*, the motion was granted, iii. 13

See MISDEMEANOR, 19. VENIRE, 4.

Nuisance.

Sands' case, (1 *Johns. Rep.* 78.)

1. An indictment, at common law, for a nuisance, in keeping 50 barrels of gunpowder in a dwelling house, near the dwelling houses of other citizens, is not good, unless it allege that the article was negligently kept.

The defendants were indicted in King's County, for a nuisance, in keeping fifty barrels of gunpowder in a certain dwelling house, in *Brooklyn*, near other dwelling houses, &c. but it was not alleged that they kept it negligently. For this reason, principally, after conviction, they removed it by *certiorari;* and the Supreme Court, in *February*, 1806, decided, that inasmuch as the indictment did not allege that the powder was kept improvidently and carelessly, the judgment must be arrested. Mr. Justice *Spencer* dissented; but *Thompson* and *Livingston*, Justices, and Chief Justice *Kent*, were of opinion, that the judgment should be arrested.

Caldwell's case, (1 *Dall. Rep.* 150.)

2. On an indictment for a nuisance, the defendant cannot give evidence that the act charged was beneficial to the public.

This was an indictment for a nuisance, in erecting a wharf on public property, tried in the *Philadelphia* Oyer and Terminer, in 1785. The defendant offered witnesses to prove that the erection of the wharf had been beneficial to the public, and, therefore, not to be regarded as a nuisance.

M'Kean, Ch. J.: This would only amount to matter of opinion, whereas it is on facts the court must proceed; and the necessary facts are already in proof. Besides, it would be no justification. The evidence is inadmissible.

Passmore's case, (1 *Serj.* and *Rawle's Rep.* 217.)

3. It is unlawful, in *Philadelphia*, for an auctioneer to place goods intended for sale in the public streets.

The question reserved for the opinion of the court, in this case, which was for a *nuisance*, was, whether an auctioneer has a legal right to deposit goods to be exposed for sale at public auction, in the public street, on the footway and cartway opposite to his own store, and the adjoining houses; there to remain during the sale, and for a reasonable time before and afterwards. After argument, the Supreme Court of *Pennsylvania*, in *December*, 1814, decided this question in the negative. *Et per Tilghman*, Ch. J.: It has been said, that the act is *necessary*, and therefore *lawful*. It is true that necessity justifies actions, which would otherwise be nuisances. *Fuel* is necessary; and therefore one may throw wood into the street, to be carried to his house. So, because *building* is necessary, the materials for building may be placed in the street, provided it be done in the most convenient manner. So a merchant may have his goods placed in the street, for the purpose of removing them in a reasonable time; but he has no right to keep them there for the purpose of selling them. It may be for the *convenience* and *interest* of an auctioneer to place his goods in the street; but he has no more right to sell them there than a private merchant; and there is no *custom* to the contrary which the court can notice.

Stewart's case, (1 *Serj.* and *Rawle's Rep.* 342.)

4. It is illegal, on the part of the prosecution, in a case for keeping a disorderly house, to ask a witness, "Whether the house was not matter of general complaint by the neighbours as disturbing them."

This, with another point, relating to the validity of an indictment for a *nuisance*, not material to be noticed, was decided by the court, after a motion in arrest of judgment, in *April*, 1815. During the trial, *Sarah Bond*, a witness for the prosecution, was permitted, notwithstanding an objection to the evidence, to testify, "that the house was a matter of general complaint, by the neighbours, as disturbing them." *Et per cur.: Yeates*, J. dissenting. This is but hearsay; "The house was a matter of general complaint:" that

is, the neighbours said they heard noises in that house which disturbed them. But we have only their words for that, and perhaps they would have spoken differently on oath. New trial granted.

5. To carry on and continue any particular branch of business, from which manifest danger, by fire, is reasonably apprehended by divers inhabitants, in a compact part of the city, is a nuisance at common law, ii. 46

6. A lawful business in a populous city, ought so to be exercised, that the least possible annoyance or inconvenience should arise to the prejudice of the citizens, ii. 161

7. In maintaining distilleries, supported by showing that the furnaces emitted smoke, and noisome smells issued, rendering the air uncomfortable, ii. 161, 162

8. Its prevention or abatement is the principal object of an indictment for that offence, iii. 7

9. After a conviction for a nuisance, in conducting a lawful business, the court will suspend the sentence a reasonable time, to give the defendant an opportunity to abate such nuisance, *ib.*

10. To constitute a public nuisance by conducting, in a populous city, a lawful business, it is not sufficient that its exercise be merely *disagreeable;* but it must be an annoyance, calculated to interrupt the public in the *reasonable* enjoyment of life or property, iv. 87

11. To constitute a nuisance, it is not necessary that the smell should be unwholesome; it is sufficient if it renders the enjoyment of life and property uncomfortable. vi. 61

12. That the establishment, complained of as a nuisance, was erected prior to adjacent buildings, is immaterial, *ib.*

13. To keep and permit hogs to run at large in the heart of a populous city, is a misdemeanor at common law, iv. 26

14. In such case, it is competent for the public prosecutor to prove particular acts of a mischievous nature committed by other hogs, *ib.*

AS RESPECTS KEEPING A DISORDERLY HOUSE.

15. Proved by general reputation, i. 28

16. A house in which there are noises and disturbances, which annoy the neighbours, is a disorderly house, i. 136. 152

17. It seems, that frequent collections of disorderly persons near the house of him who keeps an animal for bull-baiting, do not render the house disorderly, ii. 53

18. B. hired of another an entire house, and rented several rooms therein, to two other tenants, retaining the other rooms for his own use. He was indicted *for keeping a disorderly house*, generally. It was held, that for the purposes of this indictment, the part occupied by him was well alleged to be *his house;* and that it was not necessary to allege that he kept *certain rooms*, &c., iii. 134

19. Particular acts of disorder do not render a house a *common* disorderly house, *ib.*

20. In an indictment for keeping a disorderly house, the place is of the very essence of the offence, and the ward should be correctly laid, iii. 128

See FEME COVERT, 12. GAMBLING. VERDICT, 1.

Ownership.

J. Morse's case, (14 *Mass. Rep.* 217.)

1. The bailee of a sheriff, who has received of him personal chattels attached, and given an accountable receipt for the same, with a promise to deliver them to the sheriff on demand, has no such property in them, as will support an indictment for the stealing of them from such bailee as his chattels.

During the trial of the prisoner, on an indictment for stealing an ox, the property of *Cromwell Leonard*,, a question was reserved, whether the property was properly laid in *Leonard*. The facts were, that the general property of the ox was in *Olive Morse*, against whom the deputy sheriff had an attachment, in favour of *Cromwell Leonard;* and, on the seizure, the deputy sheriff delivered the ox to *Leonard*, who gave him an accountable receipt, promising to re-deliver the ox on demand. The prisoner took the ox out of *Leonard's* barn-yard.

After argument, in *July*, 1817, Chief Justice *Parker* delivered the opinion of the court: that *Leonard* had but a bare possession. The general property was in

Olive Morse; the special property in the deputy; and *Leonard* was merely his servant, to keep the property attached for him. (9 *Mass. Rep.* 104.) A new trial must be granted.

2. Though the son be under the age of twenty-one years, yet, if he work for himself, and purchase goods, which are afterwards, and while in his possession, stolen, they must be laid in the indictment as his property, and not that of his father, iii. 192
3. Property having been assigned for the benefit of creditors, and sent by the debtor as agent for the assignees, to auction, for sale, was stolen, and in the indictment, the ownership was laid in the debtor; it was held that the ownership ought to have been laid in the assignees, v. 4
4. One cannot be convicted of stealing property, the ownership of which is alleged in the indictment to be in himself and another person, v. 117
5. A large quantity of heavy property in a ship was sold by one having charge of it; and the understanding between the vendor and the vendee was, that when the property was delivered, the payment should be made. The property was discharged from the vessel, as preparatory to delivery, and put on the wharf, and while there, a part was stolen; it was held that the ownership of the property was properly laid in the vendor, vi. 56

See Autrefois Acquit, 5. Burglary, 12. 19. Feme Covert, 14. Larceny, 3. 17. Receiving Stolen Goods, 6. 13.

Pardon.

Pease's case, *in er.* (3 *Johns. Cases*, 233.)

1. One who has been convicted of forgery, but has been pardoned, is a competent witness, though the pardon contains a proviso, that it was not to be construed so as to relieve him from the legal disabilities arising from his conviction and sentence, but only from his imprisonment; it being held, that this proviso was incongruous and repugnant to the pardon itself.

The prisoner was indicted for larceny in stealing *Noah Gardner's* goods. *Gardner* was offered as a witness, but was objected to, on the ground that he had been convicted of forgery, which was admitted; but the Attorney General produced a pardon, *sub sigillo*, dated 4th *May*, 1801, by which *Gardner* "is pardoned, remised, and released, of and from the forgery, conviction, sentence, and imprisonment, &c. so far as the same extends to the imprisonment: provided, that nothing therein contained is intended, or shall be construed, so as to relieve him of and from the legal disabilities to him, from the conviction, sentence, and imprisonment, other than the said imprisonment." The prisoner's counsel still contended, that *Gardner* was incompetent as a witness; but the court overruled the objection, and the prisoner was convicted on *Gardner's* testimony.

The case was carried from the Supreme Court into the Court of Errors: and in *March*, 1808, that conviction was there affirmed, on the ground that the proviso was repugnant to the pardon itself, which operated to restore *Gardner* to competency as a witness.

2. After conviction and before sentence, the keeper of a prison has no right to discharge a criminal convict upon the production of a pardon; the court only is to judge of its validity, iv. 58
3. During the month of *June*, 1806, at the *Orange* Oyer and Terminer, N. was convicted of three distinct grand larcenies, on the first of which he was sentenced to the state prison two years, on the second, one year, and on the third, two years. On the 3d of *September*, 1808, he received a pardon, which recited a conviction for grand larceny at the same court, in the month of *June*, 1806, and a sentence *for five years*: and the pardon thereupon released and acquitted him from further imprisonment. It was held that those convictions rendered him incompetent as a witness, notwithstanding such pardon. iv. 119
5. Its inefficacy, v. 76, *et passim*.

Perjury.

Cornish's case, (6 *Binn. Rep.* 249.)

1. One who swears wilfully and deliberately to a matter that he rashly believes, but which he has no probable cause for believing, and which is false, is guilty of perjury.

Motion for a new trial, to the Supreme

Court of *Pennsylvania*, in *January*, 1814.

The prisoner was convicted of perjury, at the *Philadelphia* Oyer and Terminer, for swearing, before a magistrate, "that *Jacob Miley*, on the 8th of *November*, 1813, wilfully and maliciously did shoot him, the said *Cornish*, with shot out of a gun."

Facts: A great riot occurred in that city, on the evening of that day, and several guns were fired: The prisoner was shot in the face; and, (as one witness swore,) immediately said, "*Jacob Miley* has shot me." At this time, 2 or 3000 persons were present; and the witness, who knew *Miley*, took the person, who fired the gun, from his size and dress, to be him, but was not sure. The prisoner, on the 10th of *November*, charged *Miley*, on oath before a magistrate, in consequence of which a warrant was issued, and he was brought up on the 12th. The prisoner again swore to the fact charged in the indictment, adding that he knew him well, &c.

Miley produced unquestionable evidence that he was twenty miles from *Philadelphia* during the whole of the evening and night of the 8th of *November*, 1813, and he swore personally, that he did not know *Cornish*, having never seen him until in the magistrate's office.

On the trial, the prisoner's counsel conceded the *alibi* of *Miley*, and rested the case on the prisoner's *mistaking* another person for him. The Chief Justice, (*Tilghman*) told the jury, that if they should be of opinion, that *Cornish* had any reasonable cause for mistaking the person of *Miley*, they ought to acquit him; but if it should appear to have been a rash and presumptuous oath, taken without any probable foundation, they ought to convict him.

The Supreme Court, after argument, refused the motion, on the ground that though the prisoner might have *believed* what he swore, yet he had no reasonable cause for such belief; nor did it appear that he made any inquiry to ascertain its truth. The oath was taken with deliberation, and it was *wilfully*, *absolutely*, and *falsely* taken.

Knight's case, (12 *Mass. Rep.* 274.)

2. In an indictment for perjury in giving testimony in a court of justice, it should be alleged, or at least it should appear in the indictment, that the facts respecting which testimony was given, were material on the trial.

Motion in arrest of judgment, in *May*, 1815. The defendant was convicted of perjury, on an indictment which stated, among other matters, that on a trial before a justice, between *Lucy Fogg*, plaintiff, and *Jos. Griffin*, defendant, for trespass in cutting down a pine tree on her land; it became a material question, whether *Griffin* had cut down the tree; and that the defendant swore that himself and another, (whom it appears was in some manner implicated in the affair) never cut a tree together in the world; whereas, in truth and in fact, they did, &c. Several points were taken by his counsel, but the only one considered by the court tenable was, that the indictment did not allege, nor did it appear in any part of it, that the fact sworn to was material; and for that reason, the judgment was arrested.

3. Defined, and the definition thereof illustrated, i. 22. 158
4. May be committed in the Marine Court, by swearing in a case tried by one justice, 21
5. One witness sufficient to show where the oath was taken, *ib.*
6. Must be made out by more than the oath of one, *ib.*
7. Principle stated and illustrated, 157, n.
8. Oath must not only be false but corrupt, i. 155
9. May be committed, if oath is material, though it fails in its influence, *ib.*
10. General rules deduced from its definition, i. 22. 158
11. Committed, by one claiming exemption from an execution, by his swearing that *he had been married three weeks*, i. 163
12. Its moral enormity, i. 22, 128
12. The oath must be material to the question, and corrupt, iii. 11
13. It is immaterial whether one charged with perjury, *swore* or *affirmed* to a fact, on a former occasion, *ib.*
14. The oath laid in the indictment must correspond with that sworn to, on the trial, iii. 93
15. After the testimony is closed, the District Attorney will not be permitted, for a defect in proof, to enter a *nolle prosequi*, *ib.*
16. Two witnesses to prove the falsity of

the oath not essential: sufficient weight of proof should be produced by the prosecutor, to cause the scale of testimony to preponderate, iv. 58

17. Committed in justifying as bail in the Police; and how far the Police Magistrate had authority, iv. 125
18. The materiality of the oath need not be expressly averred, if, from the whole matter, it appears material, *ib.*
19. The oath set forth, was, "*He was owner* of *house*, *No.* 106, *Mulberry-Street*;" the *inuendo* added, "*in the City of New-York*;" held, that it did not extend the meaning of the preceding matter, *ib.*
20. It is not necessary, on the trial, that every part of the oath averred to be false, should be so proved, *ib.*
21. An oath taken *coram non judice*, in a bastardy proceeding, though false, will not sustain a prosecution, iv. 130
22. An indictment for perjury, alleged that the oath, in the taking of which the perjury was assigned, was taken by the prisoner, when sworn as a witness, in a certain cause, tried before certain Justices of the Marine Court, named in the indictment, *and a jury;* and it appeared on the traverse of the indictment, that the cause was tried by the justices, *and not by a jury;* it was held, that this was a fatal variance between the indictment and the proof, vi. 100
23. Subornation of perjury defined, i. 125
24. On the traverse of an indictment for this offence, where the perjurer suborned to swear on the former trial, is admitted as a witness, and confesses the perjury, it is not necessary either to prove the perjury or subornation by two other witnesses, i. 121
25. Suborners, on conviction, may be punished by imprisonment in the state-prison ten years, *ib.*

See AFFIDAVIT, 9. EVIDENCE, 13.

Piracy.

1. The act of capturing, where one sailed under a forged commission, being proved, it is incumbent on him to show under what commission he captured, iv. 161
2. To prove a foreign commission, it is not necessary that the witness should have seen him write, who issued it; it is sufficient, if it passed at the office as a genuine one, iv. 161
3. A commission in blank, intrusted to one, and afterwards filled up, will be sufficient to exculpate a citizen from a charge of piracy, in capturing an American vessel, *ib.*

Pleading in a Capital Case.

Battis's case, (1 *Mass. Rep.* 95.)

1. The Court will not direct an *immediate entry* of a plea of guilty, in a capital case, but give a reasonable time for the prisoner to retract.

On arraignment of the prisoner, a black, in *Oct.* 1804, on two indictments, one being for murder, committed by him on *Salome Talbot*, a white girl, of *thirteen years* of age, and the other, for a rape on the same girl, he pleaded *guilty;* and notwithstanding the court informed him of the consequence of his plea, and that he was under no legal or moral obligation to plead guilty, &c. he would not retract his pleas. The court remanded him, to give him time for that purpose. He was brought to the bar again, and still persisted in his pleas, when the court examined the sheriff, gaoler, &c. as to the prisoner's *sanity;* and it being found that he was *sane*, the court ordered the clerk to enter the pleas. Sentence of Death.

Brayley's case, (1 *Mass. Rep.* 102.)

2. If on arraignment in a capital case, the prisoner does not plead, and a jury finds that his neglect to do so is by the act of God, the court will not proceed to try him, but will remand him.

The prisoner, in *October*, 1804, being arraigned on an indictment for the murder of his wife, on being asked if he was guilty or not guilty, said, in a voice scarcely audible, that *he did not know what to say—it appeared to him she was still alive—it seemed to him, he had seen her since.* The court told him he must say guilty or not guilty. He made the same answer—After a few minutes, the court asked him, if he was *now* disposed to plead. He answered as before, and added, *that he was guilty of what he had done*, but *did not know what he had done.* Being remanded, and the next day again arraigned, no direct or positive answer could be obtained from him.

From his conduct, the court believed him in a state of mental derangement; and it appearing that soon after the supposed murder of his wife, he cut his own throat in such a way as to endanger his life, a jury was immediately impanelled and sworn, "well and truly to try between the people and the prisoner at the bar, whether he neglected or refused to plead to the indictment, of his free will and malice, or whether he did so neglect by the act of God"—and the jury having found that it was by the act of God, the prisoner was remanded. *Sed vide* the case of *Moore*, (*post*, 9 *Mass. Rep.* 402,) where it was decided, in *October*, 1812, that where one indicted for a larceny stood mute upon his arraignment, a jury was impanelled, who returned their verdict, that he stood mute fraudulently, wilfully, and obstinately: whereupon, *he was sentenced as upon conviction.* Also, see the case of *Holloway*, (*post*, 13 *Mass. Rep.* 299,) in which it appeared, that the prisoner, being indicted for murder, in *September*, 1816, and on his arraignment discovering strong marks of mental derangement, the court directed a jury to be sworn, to try "whether he was of sane memory or not; and it appearing from the testimony of witnesses, and also from inspection, that he was under the influence of a religious phrenzy, the jury returned a verdict that he was not of sane memory; and he was remanded to prison. See also the case of *Cooke*, (*City Hall Rec.* 1 vol. p. 6. *n.*)

Possession.

1. Of stolen property, unless satisfactorily accounted for, an evidence of guilt, i. 23. 174
2. Legally obtained, rendered felonious by subsequent acts, i. 50
3. In one county, of goods stolen in another, renders the thief liable in the county where the goods are found on him, i. 64
4. Of a tenement, will justify the use of so much force as may be necessary in retaining possession, i. 96
5. Holding over, after the expiration of a lease, will not furnish a justification to the owner of the premises, for committing an assault and battery on the tenant in possession, i. 119
6. Of a false and forged check, or order, which the prisoner passed under strong circumstances of guilt, must be satisfactorily accounted for, i. 130. 144
7. When a tenant wrongfully holds over after the expiration of his term, the landlord may enter peaceably and dispossess him; but he has no right, if resisted, to enter forcibly, iv. 158
8. Of stolen goods, is not always evidence that the prisoner is the felon, and such possession may be accompanied with circumstances which destroy the presumption of guilt, v. 179. vi. 65

CONSTRUCTIVE.

9. So far inferred, from the concern which two had in counterfeiting, that one, not being found in possession of the bills, was held equally guilty with the other, ii. 73
10. A man, by putting boards on a public wharf, does not so far devest himself of the possession, that he cannot maintain a prosecution against him who takes them away feloniously, ii. 86
11. The Captain of a North River coaster, having lost goods from on board in a storm, (they having floated ashore, where they were concealed, and converted to the use of the thieves,) it was held, that he was not devested of possession, ii. 167
12. In such case, it was left to the jury to judge, from all the circumstances in the case, whether the prisoners, at the time of taking up such property, *intended* to convert it to their own use, *ib.*
13. It seems that, in such case, such property, in a legal point of view, was *not lost* by the captain, *ib.*

See ASSAULT AND BATTERY, 13, 14. DISTRESS. FORGERY AND COUNTERFEITING, 86. LARCENY, 31, 32. 36. 44. RECEIVING STOLEN GOODS, 5. 8.

Receiving Stolen Goods.

Andrew's case, (2 *Mass. Rep.* 14.)

1. An indictment for receiving stolen goods lies against one who receives the goods in *Massachusetts*, though stolen in *New-Hampshire.*

Motion for a new trial, (in *March*, 1806,) on a conviction for receiving stolen

goods, the property of *Moses Dow*, which had been stolen by *Amos Tuttle*. The facts were, that *Tuttle* stole the goods in *New-Hampshire*, and immediately brought them to *Dunstable*, (*Mass.*) He was arrested and carried back to prison in *New-Hampshire*. Through information derived from him, while in gaol, by one *Symonds*, whom the prisoner then believed an accomplice, but who, in truth, belonged to an association for detecting thieves, the goods were found; and *Tuttle* having been liberated on bail, in conjunction with *Symonds*, sold them to the prisoner, (who *Symonds* and his associates believed to be in the practice of receiving stolen goods,) at *Boston*, in a manner and under circumstances which showed that he must have known them to have been stolen.

Otis, for the defendant, argued, that the states were so far independent of each other, that an offence committed in one of them could not be animadverted upon in another; and that the *United States* Constitution, art. 4, sect. 2, which provided for the detection and punishment of one charged with an offence who shall flee from one state into another, by an application to the executive, excluded the idea, that a crime committed in one state could be punished in another. He cited the case of *Butters et al.* (3 *Inst.* 113.) where goods stolen by pirates, at sea, were brought into *England*, and it was held that it was not a felony committed within the jurisdiction of the court.

Davis, Solicitor General, and *Sullivan*, Attorney General, *contra*, said, the point had been frequently decided by the court; and they cited *Cullen's* case, (1 *Mass. Rep.* 116.) as one directly in point; and they referred to the case of *Paul Lord*. The reason why one stealing goods in one *county* and bringing them into another, may be indicted, applies equally to stealing in one *state* and bringing them into another. Every moment's continuance of the trespass is as much a wrong, and may come under the word *cepit* as truly as the first taking. (*Hawk. P. C.* 217. c. 33. sect. 52.) And the court, (*Parker*, *Thatcher*, and *Sedgwick*, Justices, and *Dana*, C. J. present,) on the authority of the cases referred to by the counsel for the prosecution, and for the reasons urged by them, denied the motion; and they all held, that unless there had been a *theft within the state* (i. e. *Massachusetts*,) there could have been no receiver, and the defendant could not be convicted. (*Sed vide* 2 *Johns. Rep.* 477.)

2. Thief a competent witness against the receiver; but, uncorroborated, is entitled to little credit, i. 8. 57. 59
3. Receiver may be convicted before the thief is convicted, i. 59
4. Receiving a stolen bank bill, knowing it to have been stolen, is not a misdemeanor within the statute. (1 vol. *R. L.* p. 410. sect. 13.) iii. 59
5. The mere finding an article stolen in possession of a party charged with receiving it, knowing it to be stolen, without other evidence, is insufficient to produce a conviction, iii. 95
6. If in such case the property alleged to be stolen be laid as the separate property of W., and on the trial it should appear that the property was that of W. and K. the prosecution cannot be sustained, *ib.*
7. Circumstances indicative of guilt in the receiver, *ib.*
8. The possession of stolen goods, where the prisoner does not account for such possession, raises but a presumption of guilt, which may be rebutted by circumstances, vi. 96
9. The declaration of the wife, in the presence of the husband, not contradicted by him, is good evidence, *ib.*
10. It is not admissible, for establishing the *scienter*, to prove that stolen goods not laid in the indictment were received, i. 8. vi. 96
11. Every case of receiving stolen goods depends on its own intrinsic circumstances, i. 8. vi. 96
12. But it is admissible, to show that there was a general understanding between the thief and receiver, to sell on the one part and receive on the other, i. 8
13. The public prosecutor may show, that *stolen goods*, not laid in the indictment, were found in the possession of a person on trial, charged with receiving stolen goods, especially where it appears that *those goods* belonged to the same person from whom the goods, laid in the indictment, were stolen, and stolen at the same time, i. 105

Recognisance.

Donagan and *Cox's* case, (2 *Yeates' Rep.* 437.)

1. Surety for the good behaviour may be ordered by the court, after acquittal of a prisoner, in such a sum and for such a length of time as the public safety requires.

The prisoners had been tried in *Dauphin* county, (*Penn.*) as accessories in the murder of *Francis Schitz;* and the evidence not being sufficient, they were acquitted; though there was strong reason to believe they were concerned. The court before which they were tried, recognised them for their good behaviour, and to keep the peace towards *Peter Schitz*, for fourteen years; each in the sum of $10,000, and two sureties in $10,000 each.

Their enlargement was moved for in the Supreme Court, in 1799; their counsel relying on the 13th section of the 9th article of the Constitution, "excessive bail shall not be required," &c.

Sed per cur.: The court below had a right to require such bail, and for such a length of time, as they judged would best answer the ends of public justice. And it would be highly improper in us to interfere in a matter wherein they have exercised their legal discretion.—(*Comb.* 40. 2 *Hawk.* 442. *Cro. Car.* 332. 378. 2 *Stra.* 834. 1 *Hawk.* 106. 129. 1 *T. R.* 700.)

2. Explained, ii. 103, 104. 108
3. Respite defined, *ib.*
4. Estreat—what, ii. 104. n.
5. Suggestion whether a statute is not requisite for regulating the charges by clerks of criminal courts on recognisance, ii. 109
6. When discharged where public prosecutor neglects to bring on the trial of the case, iii. 73
7. The bail in a recognisance cannot surrender the principal, iii. 128

See Burglary, 23. Clerk of Sessions. Costs in Criminal Cases.

Riot.

1. In a church, ii. 25. iii. 7
2. By persons attending a church, in which one occurs, not established against those charged, without showing that they did some riotous act, or aided others, ii. 25
3. Cannot be established merely by proving the one charged present, *ib.*
4. Is an assemblage of two or more, for an unlawful purpose, ii. 88
5. How far he who assumes the character of a divine, may be the cause of riots and disturbances in a building of his own, and when indictable, iii. 7

Robbery.

Humphrey's case, (7 *Mass. Rep.* 242.)

1. In an indictment for robbery, *with force and violence*, it is not necessary to allege that the party robbed *was put in fear.*

On a conviction for robbery, on an indictment alleging that the prisoner, *with force and arms, on the public highway, assaulted Peter Tracy*, and one silver watch, &c. *from his person, against his will, and with force and violence, did steal, rob, take, and carry away, contra formam statuti*, a question arose whether it ought not to have been alleged that *Tracy was put in fear;* and the court, in *November*, 1810, after a consideration of all the authorities touching the definition of this offence, and especially 1 *Hawk.* c. 34. 3 *Inst.* 68. 1 *H. H. P. C.* 531. 4 *Black. Com.* 243. came to the result, in the words of *Blackstone*, "that it is not necessary, though usual, to lay in the indictment that the robbery was committed by putting in fear; it is sufficient if laid to have been done with violence."

2. Difference between robbery and grand larceny exemplified, i. 163
3. Punishment of robbery declared by statute, i. 60. 173
4. Extraordinary case of robbery, i. 81
5. A large sum in specie robbed from a woman in *Canada*, in the absence of her husband, by two men disguised, i. 117
6. Extraordinary case of robbery, committed by three foreigners on an aged man, a stranger, by decoying him into a lonely place on the Sabbath, i. 128
7. Providential detection and apprehension of robbers in their flight, i. 128. n. 173
8. Five robbers, at the same time, in the prisoner's box, sentenced, i. 130

9. A crime unheard of in this country, until within a short time past, i. 130
10. A *strange woman*, confederate with a robber, induced an unwary citizen to accompany her into a place favourable to the designs of her coadjutor. By exercising common civility toward her, the citizen hazarded his life and property, i. 172
11. Not established by one who equivocates in his testimony, and is contradicted, ii. No. 2. p. 7
12. Force or violence, in depriving a man of his property, is an essential ingredient to constitute robbery, *ib.*
13. Includes, within itself, grand or petit larceny, or assault and battery, *ib.*
14. Strong circumstances making against two prisoners tried for this offence, ii. 150
15. Case in *England*, ii. 151
16. By *putting in fear*, shown by all the means used calculated to induce fear, and not merely by the threats used, iii. 10
17. Where it appears there has been a preconcert between the husband and wife, to rob a man, and she is present, voluntarily aiding, abetting, and assisting in the crime, she is equally guilty, vi. 21
18. To constitute robbery, the money must be taken from the person, either by putting him in fear, or, under such circumstances of violence, as reasonably to produce fear in the mind of a man; and secretly picking a pocket will not amount to robbery, vi. 86
19. Of the most atrocious kind, vi. 101

Scienter.

1. Shown, in a case of counterfeiting, by proving the prisoner engaged in coining, ii. 57
2. Possession of a single bill, unaccompanied by other facts, establishing the *scienter*, insufficient, *ib.*
3. Not established when one has but a single counterfeit bill, if he received it as such, and intended to return it, though he may be largely concerned in counterfeiting, ii. 73
4. Shown by proving that large sums in spurious bills was found in a trunk, in the prisoner's house, without the jurisdiction of the court, *ib.*
6. Shown in a case for sinking a ship at sea, to defraud a particular Insurance Company, by proving that insurance was effected in other Insurance Offices, ii. 131
7. Inferred by the jury where the prisoner, during the same term, had been tried for forging an instrument of the same kind, iii. 143
8. Not established by proof of passing other spurious bills at a time remote, when the *scienter* is not brought home with regard to that charged to have been passed, iii. 148
9. However strong in relation to the *accessory offence*, if no connexion is established between that and the *principal offence*, the prosecution fails, *ib.*
10. Shown by proof that the prisoner, previously, passed a check, not laid in the indictment, purporting to be drawn by one having no account at the bank, iv. 52
11. Not allowed to be shown in a case of fraud, by proof that defendant used other false pretences to other persons, iv. 143
12. Not allowed to be shown in a case of counterfeiting, unless the bills are produced, iv. 166
13. Allowed to be shown by proof of uttering spurious bills for which the prisoner was previously tried and acquitted, and also those he passed before, *ib.*
14. On a pretended purchase of goods, the prisoner told the vendor that he had not the money, but if he could get it *of a friend*, he would buy the article, and took him to a house into which the prisoner went, and returning, passed to him the counterfeit bills; held, that to show the *scienter*, the District Attorney might prove, that two men were, about this time, taken out of this house, being engaged *in coining*; and, on searching them, counterfeit bills were found on them, vi. 99

See Blasphemy, 3. Coining, 6. Conspiracy, 38. Forgery and Counterfeiting, 36. 74. 91. Libel, 2. Receiving Stolen Goods, 10, 11, 12.

Scold.

1. Previous to the trial of a woman as a common scold, the District Attorney need not point out particular instances

of scolding upon which he intends to rely, iv. 174
2. A prosecution may be sustained against a common scold; but where there appeared to be an inveterate hostility in a particular neighbourhood against a woman, and violent recriminatory abuse appeared to have been exercised as well on behalf of the neighbouring women towards her as on her part towards them, however abusive, scandalous and clamorous may have been her language towards such women, a prosecution against her as a *common scold* cannot be maintained, *ib.*
3. Violent women quarrels will not render them indictable as common scolds, *ib.*
4. Objections to sustaining a prosecution for this offence considered, iv. 175, n.
5. On conviction, may be punished as for any other misdemeanor, vi. 90

Slander.

1. Publication of slander, in itself, is evidence of malice, i. 73
2. In an action of slander for charging the plaintiff with having sworn false in every part of her testimony on a former trial, wherein she appeared as a witness, and swore that she heard the defendant, who was a party to such suit, or a person of the same name, admit the demand sought to be recovered, the existence of which was the material point in controversy; it seems, that evidence of the admission of that demand, by the defendant, to other persons, is inadmissible, *ib.*
3. Spreading a justification of slander on the record, which justification is not proved, is a ground of damages, i. 80
4. General rules for damages in this action, *ib.*
5. Damages in slander for $3,500 against a rich man for slandering a young female, not excessive, i. 154
6. An action of slander will not lie for charging another with the forgery of an instrument which is not the subject of that crime, v. 52
7. What sufficient evidence of speaking the words to put the defendant on his defence, *ib.*
8. How far the notice of special matter will assist the plaintiff in making out his case, v. 52
9. A notice of justification in slander, where the defendant fails in justifying, is a ground for exemplary damages, when mitigatory circumstances do not exist, *ib.*
10. Though the justification is not fully established, yet if the conduct of the plaintiff, a clergyman, appears reprehensible, a nominal verdict will be rendered, *ib.*
11. *Quere.* Can the coverture of the plaintiff, in an action of slander, be given in evidence under the general issue? vi. 47
12. The rule on this subject is, that if a *feme covert* brings an action for a tort, without joining her husband, the defendant must take advantage of it by a plea in abatement. 5 *Bosanquet and Puller*, 152. 3 *T. R.* 627. 1 *Chitty's Plead.* 437. 9 *East's Rep.* 470. 8 *T. R.* 548. vi. 49, n.
13. Not maintainable where defendant disclosed the author of the calumny, and was not actuated by malice, *ib.*
14. Where the words in a declaration of slander were, "I have often heard that you was a thief, and that you would steal whenever you had an opportunity," and it appeared on the trial that the defendant, having a sister living with the plaintiff, and having heard matters derogatory to the plaintiff's character, was sent for by the plaintiff, and on coming to her house, on her request, disclosed to her what he had heard, giving the name of his author, and it appeared that he was not actuated by malice in what he said; it was held, that such action could not be maintained, vi. 47

Slave.

1. Is not a competent witness against a freeman, i. 69. 185
2. A lady, during coverture, owned and had possession of a slave, to whom she promised, that on her decease, he should be free. On the death of the lady, her husband having survived, the slave assumed his liberty, and the surviving husband never claimed his services, though the slave had often seen the hus-

band, who had frequent opportunities of making such claim. The slave had no manumission paper, but considered himself free. It was held, that *on a trial for murder* against a person free, such a slave was not a competent witness, i. 185

3. Slavery founded in cruelty and injustice, ii. 126
4. In the West-Indies, ii. 127
5. Its evils and effects, *ib.*
6. Importation of slaves into the United States prohibited, ii. 128
7. Obstacles to abolition of slavery in the United States, ii. 129
8. Appeal to the friends of humanity, ii. 130
9. Under the Act of Congress, passed *May* 10th, 1800, sec. 2d, it was held, that the captain of a vessel, employed or made use of in the transportation of slaves, is amenable to the penalties imposed, v. 120
10. It was held, that it was not necessary that any slave should be actually put on board such vessel; but that it was sufficient if the crew was engaged on the coast of Africa, in procuring slaves, and sending them to any other place by another vessel, *ib.*

See Habeas Corpus, 6, 7. Kidnapping. Manumission. Indictment, 6. 8.

Treason.

Blackstone, in the fourth volume of his *Commentaries*, from page 74 to 94, has laid down the doctrine on this subject as applied in *England*; and, taking the statute, 25 *Edw.* III. c. 2. as his text, shows that it comprehends all kinds of high treason, under seven distinct branches: The first is, "the compassing or imagining the death of the king, the queen, or their eldest son or heir." The second, "If a man do violate the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir." The third, "*If a man do levy war against our lord the king in his realm.*" The fourth, "*If a man be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere.*" and the fifth, sixth, and seventh branches relate to counterfeiting the great seal, the king's money, and the killing the chancellor, treasurer, or judges, being in their places doing their offices. Of these distinct branches of treason, only the third and fourth apply in this country; for according to the third article of the constitution of the *United States*, section third, "treason against the *United States*, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court."

More than thirty years have elapsed since the formation of the federal constitution; and it must be a subject of felicitation to every patriot, that, during this period, no scheme of ambition, no conspiracy against the union, calculated to endanger the general safety, has been matured. An immense territory, divided into separate states, governed each by laws emanating from the people, but yet bound together by a federal constitution, embracing the whole and constituting *one* government, presents a phenomenon in polity without a parallel in ancient annals. The experiment has been made, and as yet the omens have been propitious. The country has flourished and is still flourishing. Agriculture, commerce, and the arts of civilized life, are improved; and an infant country has given birth, as it were, *in a day*, to inventions which, for utility, vie with any which European experience has produced *for centuries*. Our citizens, generally prosperous and happy, have manifested a prompt obedience to the laws, for they were of their own adoption. The light of history, shining through the dark vista of past ages, discloses the shoals, the quicksands, and the rocks upon which former governments have split, and the warning voice of this mistress of national experience is, *Let the people be faithful to themselves.*

Without descanting further on topics so pleasing to the patriot, it is designed to collect the principal cases of treason which have occurred in our country, compressing them within the smallest possible compass.

A. Burr, Erick Bollman, and Samuel Swartwout's cases, (4 *Cranch*, 75. 455.)

On the 22d of *January*, 1807, *Thomas*

Jefferson, then President of the *United States*, transmitted to congress with his message, certain documents, and on the 26th of the same month, others containing the several depositions of Brigadier General *Wilkinson*, commander in chief of the army of the *United States*, then in command at *Natchitoches*. From the tenor of these depositions, it appeared that *Bollman*, on the 6th of *November* preceding, had sent, by a Frenchman, a letter to *Wilkinson*, requesting an interview, and inclosing a communication, in cipher, from *Burr* to *Wilkinson*, stating, that the former had obtained funds and had *actually commenced the enterprise:* that detachments from different points, and *under different pretences*, would rendezvous on the *Ohio*, 1st of *November;* that every thing external and internal favoured views; protection of *England* was secured. *Truxton* had gone to *Jamaica* to arrange with the admiral on that station, and would meet at the *Mississippi;* that the navy of the *United States* was ready to join, and final orders were given to *Burr's* friends and followers; it would be a host of choice spirits. *Wilkinson* shall be second to *Burr* only. *Wilkinson* shall dictate the rank and promotion of his officers. *Burr* will proceed westward, 1st *August*, never to return; with him go his daughter, the husband will follow in *October* with *a corps of worthies*. Send, forthwith, (continues the letter,) an intelligent and confidential friend with whom *Burr* may confer; he shall return immediately with further interesting details, &c.

The scheme, as appeared from the other part of the letter, was, to move down rapidly from the falls of the *Ohio*, on the 15th of *November*, with the first 500 or 1000 men, in light boats, then constructing for that purpose, to be at *Natchez* between the 5th and 15th of *December;* there to meet *Wilkinson;* there to determine whether it would be expedient, in the first instance, to seize on, or pass by *Baton Rouge;* and the writer states, "Draw on *Burr* for all expenses." Though the letter is silent as to any other than a plan against Mexico, yet, it appears, that *Swartwout*, in his conference with *Wilkinson*, mentioned that *Burr* was levying a body of 7000 men, to proceed against the *Mexican provinces*, and that the troops were to pass through the *Mississippi territory*, which was to be revolutionized; and from *Eaton's* deposition, it appeared, that as early as the winter of 1806, *Burr* had induced him to enter into a project of a secret expedition against *Mexico*, signifying that it was authorized by the Government of the *United States*, and proposing to invest him with the command of a military division. As soon as he found that *Eaton* was willing to engage in the enterprise, in the service of his country, *Burr*, by degrees, began to unveil himself; reproached the government with want of character, gratitude and justice, and dilated on certain injuries he supposed *Eaton* felt, from reflections cast on him in Congress, concerning his operations in *Barbary*, and from the delays of Government in adjusting his claims, and said he would point out to him an honourable mode of indemnity. *Burr* gradually developed to him the whole scheme, which was, to seize on *New-Orleans*, with a military force, to revolutionize the whole territory west of the *Alleghany*, and establish a monarchy, of which he was to be the sovereign; and from thence an armament was to proceed to the conquest of *Mexico*. In fine, *Eaton*, in his various interviews with *Burr*, found that his ambition was not bounded by the waters of the *Mississippi* and *Mexico*, but that he meditated overthrowing the government.

He said, if he could gain over the marine corps, and secure the naval commanders, *Truxton*, *Preble*, *Decatur*, and others, *he would turn Congress neck and heels out of doors, assassinate the President, seize on the treasury and the navy, and declare himself the protector of an energetic government;* and he confided to *Eaton* the trust of corrupting the marine corps, and of sounding *Preble* and *Decatur*.

After having thus understood the extent of the plan, *Eaton* exclaimed against the views of *Burr*, refused to accede to them, subsequently applied to the president of the *United States*, to send *Burr* as minister to *London* or *Madrid*, as he was a dangerous man in this country; and, finally, when *Eaton* heard of *Burr's* movements on the *Ohio*, he gave information to the president of the facts, the substance of which is before stated.

Wilkinson, after conferring with *Bollman* and *Swartwout*, and understanding the extent of the project as before related, communicated the affair to some of his officers, and sent on his depositions to the President. *Swartwout* and *Bollman* were apprehended by a military warrant issued by *Wilkinson*, and sent on to *Washington*, each in custody of a military officer.

A part of the troops, destined for the expedition, to the number of 30 or 40, assembled, with arms, at *Blannerhassett's* island, on the *Ohio*, having arrived in boats; but, at this period, *Burr* was several hundred miles distant. The country became alarmed, and those troops, in company with *Blannerhassett*, *Comfort Tyler*, and others who were engaged in the scheme, fearing an attack from the militia, made a precipitate retreat, by night, down the *Ohio*, to the mouth of the *Cumberland River*, where *Burr* joined them; the number then had increased to about one hundred. They descended the *Ohio* to *Bayou Pierre*, near *Natchez*, where *Burr* found that his schemes would be frustrated by *Wilkinson*, by a disclosure of the affair to the president. After entering into a recognisance for his appearance before a tribunal at *Natchez*, *Burr* was arrested the 19th of February, 1807, on the Tombigbee river, by one *Perkins;* the troops, who had been led to believe that the object of the expedition was to make a settlement of lands on the *Washita*, being left to shift for themselves.

On the 27th of *January*, 1807, *Bollman* and *Swartwout* were committed to prison at *Washington*, by one of the judges of the Circuit Court of the *United States*, on a charge of treason; and their counsel moved the Supreme Court of the *United States* for a *habeas corpus*, to bring them before the court. After argument, the court decided, that they had power to issue the writ; and after the accused were brought into court, it was finally decided, that there was not sufficient evidence of their levying war against the *United States*, to justify their commitment for treason, and they were discharged. (4 *Cranch's Rep.* from p. 75 to 137.)

In the several opinions of Chief Justice *Marshall*, on the motions made in their case, the following points were decided:

(1.) The court has the power to issue the writ of *habeas corpus ad subjiciendum.*

(2.) To constitute *a levying of war*, there must be an assemblage of persons for the purpose of effecting, by *force*, a treasonable purpose. Enlistment of men, to serve against government, is not sufficient.

(3.) When war is levied, all those who perform any part, however *minute*, or however *remote from the scene of action, and who are actually leagued in the general conspiracy*, are traitors.

(4.) Any assemblage of men for the purpose of revolutionizing, by *force*, the government established by the *United States*, in any of its territories, although as a step to, or the means of executing some greater projects, amounts to *levying war.*

(5.) The travelling of *individuals*, to the place of rendezvous, is not sufficient; but the *meeting of particular bodies of men, and their marching from places of partial, to a place of general rendezvous*, is such an assemblage as constitutes *a levying of war.*

(6.) A person may be committed for a crime, by one magistrate, upon an affidavit made before another. A magistrate who is found acting as such, must be presumed to have taken the requisite oaths.

(7.) *Quere:* Whether, upon a motion to commit a person for treason, an affidavit stating the substance of a letter, in the possession of the affiant, be admissible evidence?

(8.) The clause of the 8th section of the act of congress, "for the punishment of certain crimes against the *United States*," (vol. 1. p. 103.) which provides that, "the trial of crimes committed on the high seas, *or in any place out of the jurisdiction of any particular state*, shall be in the district where the offender is apprehended, or into which he may be first brought," applies only to offences committed on the high seas, or in some *river*, *basin*, or *bay*, not within the jurisdiction of a particular state, and not to the *territories* of the *United States*, where regular courts are established, competent to try those offences.

(9.) The word "*apprehended*," in that clause of the act, does not imply a *legal arrest*, to the exclusion of a *military* arrest or seizure.

Burr was brought to *Richmond*, in *Virginia*, under a military escort; and on the 30th of *March*, 1807, was brought before Chief Justice *Marshall* for examination. After a long discussion before the judge, *Burr* was admitted to bail. Afterwards, objections were made by him to several on the panel of the Grand Jury; the arguments were various and extensive; and it was not until the 7th of *August*, 1807, that a bill was found. The indictment contained two counts: the first charging *Burr* with treason; for that he, on the 10th of *December*, 1806, at *Blannerhassett's island*, in the county of *Wood*, and district of *Virginia*, and within the jurisdiction of this court, with force and arms, unlawfully, falsely, maliciously and traitorously, did compass, imagine and intend to raise and levy war, insurrection and rebellion against the *United States*, &c. The overt act alleged was, that *Burr* assembled with certain armed men, thirty or more, and that they then and there joined themselves together against the *United States*, and prepared to levy war, &c. The second count stated one of the overt acts to be, the descent of the armed men from *Blannerhassett's island* down the *Ohio* and *Mississippi*, to seize on *New-Orleans*.

The cause continued until the 1st of *September*, (twenty-four days,) when the jury returned a verdict of NOT GUILTY.

To state even the points raised by the respective counsel, in the progress of this case, would transcend reasonable limits; suffice it to say, that after much testimony had been adduced on the part of the prosecution, tending to establish the overt acts committed on *Blannerhassett's island*, (it having been admitted that *Burr* was absent several hundred miles when the armed men assembled,) the counsel for the prosecution offered collateral evidence, as to acts committed by the accused, out of the jurisdiction of the court. His counsel objected to the testimony; and among other grounds, urged to the court, *that no person could be convicted of treason in levying war, who was not personally present at the commission of the act.* The discussion on the admissibility of this evidence occupied ten days. Some of the most celebrated civilians in the *Union* were engaged; and on the 31st of *August*, Chief Justice *Marshall* delivered the opinion of the court, that the testimony was inadmissible; and from the principles contained in the opinion, the counsel for the *United States* offered no further evidence, and the accused was acquitted. After considerable further discussion, he was indicted, on the 9th of *September*, for a *misdemeanor*, in commencing a military expedition against the dominions of Spain. The counsel for the prosecution offered in evidence the declarations of *Blannerhasset*, to implicate *Burr*. These declarations being objected to, the court decided against their admissibility, and he was acquitted.

The principal points in the opinion of the judge, relative to the admissibility of collateral evidence, in the case of treason, follow:

(1.) The term, "*levying war*," is used in the Constitution in the same sense in which it was understood in England, in the statute 25 *Edward* III.

(2.) All those who perform the various parts, or any part, in prosecuting the war, may be correctly said to levy war.

(3.) If the war be actually levied, if the accused has performed a part, but is *not leagued in the conspiracy*, and has *not appeared in arms* against his country, he is not a traitor.

(4.) *Constructive treason*, is where the direct and avowed object is not the destruction of the sovereign power.

(5.) When a body of men *are assembled*, for the purpose of making war against the Government, *and are in a condition to make that war*, the assemblage is an act of levying war.

(6.) It must be a "*warlike assemblage*," carrying the *appearance of force, and in a situation to practice hostility.*

(7.) An assemblage of men, with a treasonable design, *but not in force*, nor in a condition to attempt the design, nor attended with *warlike appearances*, is not the levying of war.

(8.) The travelling of individuals to a place of rendezvous, *separately* or *together*, but not in *military form*, is not *levying war*. The act must be unequivocal, and have a warlike appearance.

(9.) There must be an employment of

actual force. Troops must be embodied; men must be *openly* assembled.

(10.) *Arms* are not an indispensable requisite to *levying war*; nor the actual *application of force to the object.*

(11.) It is not sufficient that the indictment state generally, that the accused *levied war*; an overt act must be laid, and proved as laid.

(12.) A person may be concerned in a treasonable conspiracy, and yet be *legally* as well as *actually absent*, while *some one act of the treason is perpetrated.*

(13.) Every one concerned in a treasonable conspiracy, is not constructively present at every overt act of treason, committed by others, not in his presence.

(14.) A man may be legally absent who has counselled or procured the treasonable act.

(15.) The prisoner can only be convicted of the overt act, laid in the indictment. If other overt acts can be inquired into, it is only to prove the overt act charged.

(16.) A person cannot be constructively present at an overt act of treason, unless he is *aiding and abetting at the fact*, or *ready to afford assistance* if *necessary.*

(17.) If the particular overt act be advised, procured, or commanded by the accused, he is guilty *accessorily*, and not *directly*, as principal.

(18.) A person in one part of the *United States*, cannot be considered as *constructively present*, in a remote part of the *United States.*

(19.) The presence of a party, where presence is necessary to his guilt, is part of the *overt act*, and must be proved by *two witnesses.*

(20.) An indictment, charging one with being present at an overt act, cannot be supported by proving only that he caused the act to be done in his absence by others. No presumptive evidence, no facts from which presence can be inferred, will satisfy the constitution and law.

(21.) The part which one takes in the war, constitutes the overt act, on which alone he can be convicted.

(22.) *Quere:* Whether he who procures an act to be done, may be indicted as having performed the act?

(23.) If proof of procurement is admissible in *England*, to establish a charge of actual *presence*, on an indictment for *levying war*, it is only by virtue of the operation of the common law, upon the statute of *Edward* III.

(24.) *Quere:* Whether there be in this country, a similar operation of the common law?

(25.) If proof of procurement be admissible, upon a charge of presence, such procurement must be proved, in the same manner, and by the same kind of testimony, as would be required to prove actual presence.

(26.) The conviction of some one who has *committed the treason*, must precede the *trial* of him who has advised or procured it; and the right of the prisoner to call for the record of conviction, is not waived, by pleading to the indictment.

(27.) *Quere:* Whether the crime of advising or procuring a levying of war, be within the constitutional definition of treason?

(28.) If the overt act be not proved by *two witnesses*, so as to be submitted to the jury, all other testimony is *irrelevant.*

(29.) *Levying war* is an act compounded of law and fact, of which the *jury*, aided by the court, must judge.

(30.) Appearing at the head of an army, would be an *overt act of levying war.* So, also, detaching a military corps from it, for military purposes. (*See* 4 *Cranch's Rep.* 533, 534.)

During the revolution, and immediately after, there were several cases of *treason* which occurred. In the case of *Malin*, (1 *Dall. Rep.* 33.) which was tried in the Oyer and Terminer of *Philadelphia*, in *September*, 1778, it was ruled,

(1.) That the mistaking a *corps of American troops* for *British*, and going over to them, as such, did not amount to treason; and that no evidence of words, spoken by the prisoner relative to the mistake, could be admitted.

(2.) Evidence may be given of an *overt act* committed in another county, after an *overt act* is proved to have been committed in the county where the indictment is laid and tried.

In the case of *Carlisle*, (1 *Dall. Rep.* 35.) which was for treason, in taking and holding a commission from the king of *Great Britain* to guard over gates of the city of *Philadelphia*, the overt acts alleged were,

the *traitorously* joining himself with others, in levying war against the state, joining the king's army, and giving intelligence, &c. it was ruled by the court, in 1788, (1.) That evidence that the prisoner had a power to let people in and out of the city, when in possession of the enemy, ought to be received; but not as conclusive proof of his holding a commission under them.

(2.) But evidence of his seizing salt, or disarming the *Americans*, does not apply to that species of treason; though it may prove his having joined the armies of the enemy.

(3.) It is not enough to lay in the indictment, that the prisoner sent intelligence, without setting forth the particular letter or its contents.

(4.) The charge of *levying war*, is not, of itself, sufficient; but assembling, joining, and arraying with, the forces of the enemy, is a sufficient *overt act* of levying war.

(5.) There must be an actual enlistment of the person *persuaded*, to make it treason in the persuader.

(6.) If an *overt act* has been proved where the indictment is laid, the prisoner's confession may be given in evidence to corroborate that proof.

In the case of *Chapman*, (1 *Dall. Rep.* 53.) which was a proceeding of *Attainder* against him, as a traitor, under a proclamation by the executive of *Pennsylvania*, in 1781, the following points were decided in the Supreme Court:

(1.) Treason is a crime known at the common law.

(2.) Treason, which is nothing more than a criminal attempt to destroy the government, may be committed before the different qualities of the crime are defined, and its punishment declared by positive law.

In the case of *M'Carty*, tried in the *Philadelphia* Oyer and Terminer, in *April*, 1781, (2 *Dall. Rep.* 86.) for treason in levying war, &c. by joining the armies of the king of *Great Britain*, it was offered to give his confession in evidence, made at the time of his arraignment; but this was objected to, as the confession could only be admitted by way of corroboration; and that an *overt act* should be first proved. (*Fost.* 10. 240.) The court ruled,

(1.) Enlisting, or procuring any person to be enlisted in the service of the enemy, is an act of treason.

(2.) Nothing will excuse the act of joining an enemy, or levying war, but the fear of immediate death.

In the case of *Weidle*, (2 *Dall. Rep.* 88,) tried in 1781, for *misprision* of *treason*, for his declaring, "That he had lived six years in *London*, and nine years in *Ireland;* and never lived happier in his life, than he had done under the *English government*; and that the *king* of *England* is our *king*, and will be yours;" it was ruled, that the words charged must be spoken with a malicious or mischievous intent, to render them criminal.—He was convicted.

Those conversant with the politics of our country for the last thirty years, will remember, that in 1794, there was an insurrection in the western parts of *Pennsylvania*, in opposition to the excise laws then recently adopted by Congress: that the insurgents assembled in arms at *Braddock's Field*, and at *Couche's Fort:* that a party of them burned the house of General *Neville*, an excise officer, and perpetrated other atrocious acts. A number of them were apprehended and tried for treason, in the Circuit Court of the *United States* in *Philadelphia:* some were acquitted and some convicted; but were afterwards pardoned by the President, and a general indemnity soon followed.

In the case of the *Insurgents of Pennsylvania*, (2 *Dall. Rep.* from 335 to 342.) it is shown,

(1.) The number of jurors that may be returned, and the form of the panels, for high treason.

(2.) A copy of the *caption* of the indictment, as well as of the indictment itself, must be delivered to the prisoner.

(3.) What is a sufficient addition, and what a sufficient definition of the places of abode of jurors and witnesses.

(4.) What time shall be allowed the prisoner for the purpose of bringing testimony from counties where witnesses live.

In the case of *Vigol*, one of the most active of the insurgents, (2 *Dall. Rep.* 346.) it is shown,

(1.) What constitutes treason by levying war against the *United States*, and

how to be proved. (From p. 346 to 356.)

(2.) If the overt act of treason is proved and laid before the charge was presented, it is sufficient; and whether committed by the number of insurgents specified in the indictment, is immaterial.

In the case of *Hamilton*, (3 *Dall. Rep.* 17.) charged with *high treason*, he was admitted to bail in the Supreme Court of the *United States*, in *February*, 1795; himself in $4,000, and two sureties in $2,000 each.

In the case of *Fries*, (3 *Dall. Rep.* 515.) charged with high treason, after a trial of fifteen days, he was convicted; but a new trial was granted by reason of the hostile declarations of one of the jury.

Usury.

Frost's case, (5 *Mass. Rep.* 53.)

1. Upon an indictment for usury, the borrower is a competent witness.
2. To entitle one to a moiety of the penalty for usury, it must appear on the record that he prosecuted, complained, or sued for it, within a year after the offence was committed.
3. The offence of usury is completed, if more than legal interest be paid at the time of the loan, whether the principal ever be repaid or not.
4. If the lender on usury acts as agent for another, this will be no excuse for him, especially if he does not disclose the fact at the time of the transaction.

The above points were severally decided by the Supreme Judicial Court, in *March*, 1809, in a prosecution against the defendant, under the statute, for taking and receiving of *Ebenezer Clough* more than six *per cent. per annum*, for the loan of $200, for ninety days; and it appeared that the sum received was $16 for that time. Questions conformable to those points were reserved; and motion made for a new trial, but it was denied.

Variance.

1. If, from the general tenor of a forged check, it appears uncertain whether the name of the payee is *Banker*, *Barker*, or *Bunker*, a *fac simile* of which name is made or attempted to be made in the indictment, an objection to the indictment, on the ground of a variance between the name in the check and that in the indictment, was held not well taken, i. 130
2. An indictment alleged, that a bond was conditioned for the payment of $657; but the condition was for the payment of that sum, *with interest*; it was held that this variance was fatal, v. 79

See INDICTMENT. LIBEL, 22, 23. PERJURY, 14. 22.

Verdict.

Hunter's case, (2 *Serj.* and *Rawle's Rep.* 298.)

1. A verdict of, "guilty of keeping a disorderly house and disturbing his neighbours," is bad.

A writ of error, in *April*, 1816, was brought on a judgment entered in the Quarter Sessions of *Philadelphia* county, in a case where the indictment was for a *common nuisance*, in keeping a disorderly house; and it appeared from the return to the writ, that the jury found the defendant "guilty of keeping a disorderly house and disturbing his neighbours." It was assigned for error, that this was not an indictable offence. *Et per Tilghman*, Ch. J. It is not necessary that the jury should find one guilty of every thing charged in the indictment. It is sufficient if they find him guilty of a part, provided that part be an indictable offence. The keeping of a disorderly house is not indictable, unless it be laid as a common nuisance; because a house may be disorderly without being injurious to any but its inhabitants; and it is the injury done to the public which is the essence of the offence. The jury have found the defendant guilty of no part of the matter charged in the indictment, but the keeping of a disorderly house, which is not *alone* indictable.

Judgment reversed.

Boyle's case, (2 *Serj.* and *Rawle's Rep.* 40.)

2. Upon an indictment for concealing the death of a *bastard child*, the jury found the prisoner "guily of the *concealment* in manner and form as she stands indicted;" held, that the verdict was bad, in consequence of the omission to find the *bastardy* of the child.

A writ of error, in *September*, 1815, was brought on a judgment, after convic-

tion, for concealing the death of a bastard child, contrary to the form of the act, (22d *April*, 1794.) And there were several other points discussed that are not here noticed. The conviction was had in *Indiana* county; and it appeared from the return, that the jury, upon one of the counts in the indictment, found the prisoner "guilty of the concealment, in manner and form as she stands indicted." The omission, in the verdict, of the *bastardy*, was assigned for error. *Et per Tilghman*, C. J. Unless the child was a *bastard*, there is no offence. Now I do not feel myself justified in affirming, that "*guilty of concealment in manner and form*, &c." includes the circumstance of *bastardy*. If such was the intent of the jury, the court who received the verdict should have recorded it in such a manner as to leave no doubt. As it stands, it does not warrant the judgment; and it must be reversed.

3. Is the result of the conviction of the jury from the evidence; they do not swear that the facts, upon which such result is founded, are true, ii. 149
4. A prisoner tried with another is not entitled to call for a verdict of acquittal, that he may be sworn as a witness, unless where no evidence whatsoever against him has been produced, iv. 136
5. That no person shall "*be subject, for the same offence, to be twice put in jeopardy of life or limb*," is a fundamental principle of the common law, and as such, is obligatory on all courts; and whether that clause, in the amendments to the constitution of the *United States*, was intended to bind the state courts, is, therefore, immaterial: but no man, in a legal sense, can be said to have been "put in jeopardy of life or limb," unless he has been *acquitted* or *convicted* by the verdict of a jury, v. 97

See Affidavit, 7, 8. Assault and Battery, 31. Conspiracy, 3. Jury, 5, 6, 7. Libel, 6. New-Trial, 11.

Venire.

M'Kay's case, (18 *Johns. Rep.* 212.)

1. A paper purporting to be a *venire*, but without the *seal* of the court, is a nullity.
2. Where a prisoner was tried, at an *Oyer* and *Terminer*, for murder, and convicted without a *venire* returned and filed, it was held to be error, and a new trial was awarded.
3. A peremptory challenge made by the prisoner to the *polls*, is no waiver of his right to object to the want of a *venire;* for this is not a ground of challenge to the *array*.
4. Where a prisoner who has been found guilty, and judgment is arrested on his motion and in his favour, a new trial may be awarded.

On *habeas corpus:* The prisoner, having been convicted of murder, at the *Alleghany* Oyer and Terminer, in administering *arsenic* to his wife, was brought before the Supreme Court, in *August*, 1820, when his counsel moved in arrest of judgment, on the ground that no *venire* had been issued to the sheriff to summon a petit jury; it appearing, after conviction, that the supposed *venire* was not under the *seal* of the court; and that no official return was made to it, with the panel of jurors annexed.

It was urged on his behalf, that a *venire* was essential; and that this *paper* was a nullity. But on the other side, it was argued, that no *venire* was necessary, by statute, and also, because the prisoner was entitled to a peremptory challenge.

The court decided, that a *venire* is essentially necessary, to authorize the sheriff in summoning a jury; that this, being without a *seal*, was a nullity; and that the right of a peremptory challenge, on his part, was no waiver of his right to object to the want of a *venire*. It had been suggested by his counsel, whether arresting the judgment did not entitle him to a discharge. But the judgment is arrested *on his motion*, and *for his benefit;* and the court was clearly of opinion, that he was not thereby exonerated from another trial.

Ordered, that judgment be arrested, that the prisoner be remanded, and that the proceedings be sent down by *procedendo*.

Warrant.

Conner's case, (3 *Binn. Rep.* 38.)

1. A warrant of arrest, issued upon *common rumour and report* of the party's guilt, though it recite that there was danger of his escaping before witnesses could be summoned, to enable the judge to issue it upon oath, is illegal, and the constable to whom it is directed, is not bound to execute it.

Error to the *Northumberland* Oyer and Terminer, *(Penn.)* from the Supreme Court.

The defendant, a constable, had a warrant of arrest put into his hands, against one *Jacob Langs*, issued by Judge *Cooper*, reciting that it appeared to him, from *common rumour and report*, that there was strong reason to suspect *Langs* of counterfeiting, &c. and that he was likely to quit the county, &c. before witnesses could be summoned to make oath, &c. and commanding the defendant to bring *Langs* forthwith before the judge. The defendant neglected and refused to obey the exigency of the writ; and this constituted the charge in the indictment against him, of which he was convicted.

The principal error assigned and argued was, that the warrant was unconstitutional and void; and the defendant was not bound to execute it.

The court decided, that as the 8th section of the 9th article of the constitution of *Pennsylvania* declared, that no warrant should be issued to seize any person, without probable cause, *supported* by *oath or affirmation;* and as it appeared that this warrant was issued upon *common rumour and report*, it was void, and the defendant was not *bound* to execute it; and the judgment was therefore arrested.

Foster et. al. case, (1 *Mass. Rep.* 488.)

2. A justice has no authority to direct a warrant to a private person.
3. *Query:* Whether he may not, when there is no officer near to serve it.

The defendants were indicted for an assault and battery, committed on one *Weaver*. The facts were, that a justice of the peace, of the county of *Kennebeck*, issued a warrant to arrest one *Foster*, for an assault and battery on *Price*. The warrant was directed to the sheriff, or his deputy, and to all or any of the constables of *W, or to P. Weaver, jun.* He was beaten by the defendants while acting under the warrant. Two of them were convicted; and the principal question was, whether, directed as it was, the warrant was valid. In *June*, 1805, after argument, the court decided, that a justice has no right to issue a warrant to a private person; and *per Sedgwick*, J.: By the act of 26th *February*, 1796, any justice, for the preservation of the peace, upon view, for the breach thereof, shall have authority *(in the absence of the sheriff, deputy sheriff, or constable,)* to require *any person* to apprehend and bring before him the offender. In these instances of *urgency*, the justice cannot authorize a private person, except "in the absence of the sheriff," &c. and much less can he when no such *urgency* exists. Judgment for defendants.

4. From an Assistant Justice's court, cannot be executed by the plaintiff, iv. 46, n.
5. G. gave S. a promissory negotiable note, who, without consideration, endorsed it to W. and commenced a suit in his name, by warrant, before an assistant justice in *New-York*, and procuring a deputation on the warrant, attempted to take G., who assaulted him —it was held, that this deputation, being an evasion of the statute, was illegal, *ib.*

See ARREST, 1. 5, 6, 7, 8, 9.

Witness.

Herrick's case, (13 *Johns. Rep.* 82.)

1. A witness, either on *voire dire*, or cross-examination, is not bound to answer any question which would subject him to punishment, or render him infamous or disgraced.

On the trial of the prisoner, at the *Washington* sessions, for larceny, he called on one *Hardy*, as a witness, who, on coming to the stand, was asked by the district attorney, "whether he," *Hardy*, "had not been convicted of petit larceny, and was not in confinement upon that conviction." The prisoner's counsel objected to the question, but the court overruled the objection, and the witness then answered the inquiry in the affirmative, and was rejected.

The question was brought before the Supreme Court, in *January*, 1816, and it was determined, that a witness, either on *voire dire*, or on cross examination, was not bound to answer any question, tending to his punishment or disgrace; and that the conviction in the court below was erroneous. *(Peake Ev.* 129, 130. *Leach.* 382. old ed. 4 *Term Rep.* 440. 4 *State Trials*, 148. *Salk.* 153. *Bull. N. P.* 292. *Gilb. Law Ev.* old ed. 102. *Comyn's Dig. Testmoigne*, A 5, and 8 *East*, 77.)

Waite's case, (5 *Mass. Rep.* 261.)

2. The confession of a witness, in a criminal prosecution, as to his incompetency, cannot be admitted to disqualify him.

The motion was, to set aside a verdict

on an indictment for the forgery of a receipt, on the ground of the incompetency of *Benjamin Richardson*, against whom the receipt was forged, and who was admitted as a witness against the prisoner.

The principal reason urged against *Richardson* was, that he had confessed that he expected that the conviction of *Waite*, would be $1000 benefit to him, *R.*, by means of one *B. Prince*, whom the prisoner had sued for slander. And the court, in *May*, 1809, decided, that the confession of a witness, as to his incompetency, cannot be admitted to disqualify him; if it were otherwise, any *unwilling witness*, for the state, might, at any time, disqualify himself.

Hutchinson's case, (10 *Mass. Rep.* 225.)

3. A child under nine years, who appears, on examination by the court, to possess a sufficient sense of the wickedness and danger of false swearing, may be sworn as a witness.

The prisoner being capitally indicted for a *rape*, *Alfred Hadlock*, a boy between eight and nine years of age, was offered as a witness for the prosecution. He was objected to, on the ground of his extreme youth, when the court examined him touching the wickedness and danger of false swearing. He gave rational and pertinent answers, when he was ordered to be sworn, the court observing that his credit, which was greatly impaired by his age, was to be judged of by the jury. (2 *East's C. L.* 973.)

Murphy's case, (14 *Mass. Rep.* 387.)

4. The credibility of a female witness may properly be impeached, by proving her to be a common prostitute.

On the trial of the prisoner, who was indicted for a rape, the Attorney General offered evidence, that a female witness, who had testified for the prisoner, had been the mother of several bastard children. This evidence being objected to, the objection was overruled. *Et per cur.* A common prostitute must necessarily have greatly corrupted, if not totally lost, the moral principle, and, of course, her respect for truth, and her regard for the sacredness of an oath. She may be thus impeached.

Millard's case, (1 *Mass. Rep.* 5.)

5. The court will not put off the case for the want of a witness believed material, if he do not reside within the jurisdiction of the court.

Motion to put off a criminal case was made, on the ground that the prisoner had written several times to the witness in *Vermont*, but had received no answer. No other means were pretended to have been employed, and four months had elapsed from the last term.

The court, in *September*, 1804, (*Strong*, *Sedgwick*, *Sewall*, and *Thatcher*, justices, present,) refused to put off the trial, saying, that it was doubtful whether he really had any witnesses. But if he had, the court could not compel them to attend, as they were out of the jurisdiction of the court.

6. Postponement of a trial will be denied by the court, when it appears that even if the witness were produced, he could not establish the fact relied on—especially where the object appears to be delay, i. 30
7. If, on the traverse of an indictment, against two, no evidence is produced against one, he is a competent witness for the other, i. 62
8. Motives of a witness, in the institution of a criminal prosecution, cannot be impeached by himself, i. 66
9. When to be recognised to appear before the grand jury, i. 67
10. Credit affected by visiting haunts of licentiousness, i. 129
11. Is not bound to answer a question, the answer to which, if true, might have a tendency, either of disgracing or criminating himself, i. 134
12. On the traverse of an indictment for the forgery of an order for the delivery of goods, the person on whom the order is drawn, and he whose name is forged, are competent witnesses, i. 141
13. Necessarily disclosing his own infamy, will be bound over for good behaviour, i. 164
15. Who gives different statements under oath, is to be distrusted wholly, ii. 33
16. Being a thief, his testimony must be strongly corroborated, ii. 38
17. Being a child, possessing intelligence, the court will instruct it before sworn, ii. 147
18. Appearing in a suspicious light, will be strictly scrutinized—sometimes discredited, i. 66

19. Should not be tampered with, ii. 170
20. Offered $1,000 to swear false; discloses the offer on the trial, *ib.*
21. Who, in open court, makes use of vulgar obscene language, which he imputes to another, whose declarations he undertakes to recite in a continued relation, but without being required to state the precise words, will be ordered into custody, iii. 49
22. Though the public prosecutor cannot introduce other witnesses *for the purpose of discrediting* a witness on behalf of the prosecution, yet he is not precluded from *contradicting facts* previously sworn to by his own witness, iii. 151
23. Where a case, on the proof, stands *as strong as possible*, it is injudicious, and sometimes ruinous, to attempt to make it *stronger*, i. 62. iii. 152
24. Professional men are properly called as witnesses to state facts and opinions *within the scope of their profession*, but not to give their opinion on things, of which the jurors themselves can as well judge, v. 26. 31
25. The court will commit a witness to answer for an offence, which in his testimony he shows he has perpetrated, vi. 2
26. Who, being an engraver, and having been employed by counterfeiters to make an engraving on copper of the word and number *FIVE*, in imitation of the same on a bank bill, and who swears that he did not know the object, until after the paper was brought to print the bills, will not be believed, ii. 22
27. Convicted of felony, by his own admission, insufficient,—record of his conviction should be produced, v. 181

See Accomplice. Assault and Battery, 1. 3, 4. Breach of Sabbath, 3. Conspiracy, 10. Evidence. Feme Covert, 5, 6, 7. Forgery and Counterfeiting, 6. 12. 19, 20. 28. 62. Infant, 3, 4. Jury, 36. Larceny, 24. Marriage, 4. Pardon. Perjury. Receiving Stolen Goods, 2. Robbery, 11. Slave, 1. Usury, 1.

FINIS.